

Gilroy v Buckley

2008 NY Slip Op 31887(U)

June 11, 2008

Supreme Court, Nassau County

Docket Number: 4988-06/

Judge: F. Dana Winslow

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

**TRIAL/IAS PART 7
NASSAU COUNTY**

THOMAS GILROY,

Plaintiff,

MOTION DATE: 4/2/08

-against-

INDEX NO.: 14988/06

JESSICA A. BUCKLEY,

MOTION SEQ. NO.: 002, 003

Defendant.

The following papers read on this motion (numbered 1-3):

Notice of Motion.....1

Notice of Cross Motion.....2

**Affirmation in Opposition to Cross Motion and
Reply Affirmation to Defendant's Motion.....3**

Defendant Jessica A. Buckley's motion and plaintiff Thomas Gilroy's cross motion for summary judgment pursuant to **CPLR §3212** are determined as follows.

Plaintiff Thomas Gilroy, age 65, alleges that on May 4, 2006 at approximately 5:55 p.m., a motor vehicle owned and operated by him was allegedly hit in the rear by a vehicle owned and operated by defendant Jessica A. Buckley. The accident occurred on North Village Avenue, approximately five feet south of its intersection with Osborne Avenue, Village of Rockville Centre. Defendant now moves for an order dismissing plaintiff's complaint pursuant to **CPLR §3212**, on grounds that plaintiff failed to sustain a "serious injury" within the meaning of **Insurance Law §5102(d)**. Plaintiff cross moves for summary judgment pursuant to **CPLR §3212** on the issue of liability on the basis that defendant struck plaintiff's vehicle in the rear while plaintiff's vehicle was slowing down to make a right turn.

Defendant's motion for summary judgment on the grounds that plaintiff failed to demonstrate a serious injury within the meaning of Insurance Law §5102(d)

Insurance Law §5102(d) provides that a "serious injury means a personal injury which results in (1) death; (2) dismemberment; (3) significant disfigurement; (4) a fracture; (5) loss of a fetus; (6) permanent loss of use of a body organ, member, function or system; (7) permanent consequential limitation of use of a body organ or member; (8) significant limitation of use of a body function or system; or (9) a medically determined injury or impairment of a nonpermanent 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" (numbered by the Court). The Court's consideration in this action is confined to whether plaintiff's injuries constitute a permanent consequential limitation of use of a body organ or member (7) or significant limitation of use of a body function or system (8). The Court finds that plaintiff has demonstrated a *prima facie* failure to prove a medically determined injury which prevented plaintiff from performing all of the material acts constituting his usual and customary daily activities for ninety days of the first one hundred eighty days following the accident (9).

In support of her motion for summary judgment, defendant submits a report of examination, dated October 3, 2007, of orthopedist Isaac Cohen, MD covering an examination of that date, report of examination, dated October 4, 2007, of neurologist Maria Audrie DeJesus, MD covering an examination of that date and reports of radiologist David A. Fisher, MD, dated November 4, 2007, reviewing several MRIs of plaintiff's cervical and lumbar spines.

Dr. Cohen found that physical examination of the cervical spine revealed flexion and extension of 40 degrees (normal up to 45 degrees), lateral bending in the 40 degree range (normal up to 45 degrees) and rotational motion to the right and left in the 80 degree range (normal up to 80 degrees). Dr. Cohen also found negative compression and Spurling's test.

With respect to the thoracolumbar spine, Dr. Cohen's examination revealed forward flexion to 90 degrees (normal up to 90 degrees), hyperextension to 30 degrees (normal up to 30 degrees), right and left lateral bending to 30 degrees (normal up to 30 degrees) and right and left rotational motion to 30 degrees (normal up to 30 degrees). Dr. Cohen also reported a negative

straight leg raising test in the sitting position and no tenderness, muscle spasms or trigger points upon palpation. With respect to plaintiff's shoulders, Dr. Cohen found forward elevation of 150 degrees (normal up to 150), backward elevation to 40 degrees (normal up to 40), abduction to 150 degrees (normal up to 150), adduction to 30 degrees (normal up to 30), external rotation of 90 degrees (normal up to 90) and internal rotation of 40 degrees (normal up to 40). Dr. Cohen's testing of the upper extremities revealed symmetrical reflexes, normal motor power and no evidence of weakness. With respect to the lower extremities, Dr. Cohen found normal heel/toe gait, reflexes and muscle power. Dr. Cohen noted that all range of motion testing was conducted by visual observation.

Dr. Cohen diagnosed a "status post cervical and lumbosacral strain, resolved." Dr. Cohen states that plaintiff's "subjective complaints of discomfort" could not be corroborated by his examination and that plaintiff has a "satisfactory and normal functional capacity of the musculoskeletal system without any objective evidence of functional disability related to this accident." Dr. Cohen states further that the MRI of plaintiff's cervical spine performed on June 1, 2006 did not reveal any changes compared to a cervical spine MRI performed on September 29, 2004. Dr. Cohen concluded, that "there is no objective evidence of sequellae or permanency" as a result of the accident.

Dr. DeJesus provides range of motion testing, comparing the results to normal, of plaintiff's cervical and lumbar spines and noted normal results. Dr. DeJesus also reported normal muscle tone in the upper and lower extremities, normal strength in the upper extremities and legs, deep tendon reflexes of 1+ in the biceps, triceps, brachioradialis, patellar and achilles, normal sensory examination and normal gait. Dr. DeJesus concluded that plaintiff had a whiplash injury caused by the subject accident. Dr. DeJesus diagnosed "status-post cervical and lumbar sprain/strain, resolved" and "normal neurological examination." Dr. DeJesus concluded that plaintiff can perform all his usual daily activities without neurological limitations.

Dr. Fisher reviewed the MRIs of plaintiff's cervical spine of September 29, 2004 conducted in connection with a prior accident of August 24, 2004 and of June 1, 2006 conducted in connection with the subject accident of May 4, 2006. With respect to the September 29, 2004 MRI, Dr. Fisher found "diffuse degenerative changes, most pronounced at C5/6 and C6/7 levels." He noted "small central disc protrusions (herniations) at C3/4 and C4/5" with no effect on the

thecal sac, cervical cord or nerve roots. With respect to the MRI of June 1, 2006, Dr. Fisher noted stable degenerative changes. Dr. Fisher concluded that both studies revealed degenerative changes at multiple levels, most pronounced at C5/6 and C6/7 and disc bulges and small herniations at C3/4 and C4/5. Dr. Fisher states “these findings predated the [May 4, 2006] accident by at least one year and seven months and therefore clearly represent a preexisting condition. The mild disc bulge and small herniations noted are compatible with the amount of degenerative change present.”

Dr. Fisher reviewed the MRIs of plaintiff’s lumbar spine of February 28, 2000 conducted in connection with a prior accident of January 7, 2000, and of September 29, 2004 conducted in connection with the August 24, 2004 accident, and of June 1, 2006 conducted in connection with the subject accident of May 4, 2006. With respect to the February 28, 2000 MRI, Dr. Fisher noted degenerative changes at L1/2, L4/5 and L5-S1 with accompanying mild disc bulges. With respect to the MRIs of both September 29, 2004 and June 1, 2006, Dr. Fisher noted “stable degenerative changes, most pronounced at L1/2.” Dr. Fisher concluded that all three studies reveal degenerative changes at multiple levels, most pronounced at L1/2, no disc herniations and mild disc bulges compatible with degenerative change.

Defendant also submits portions of the deposition testimony of plaintiff conducted on August 22, 2007. Plaintiff testified that he was not confined to bed or home as a result of the accident although the Court notes that in plaintiff’s bill of particulars, plaintiff makes claims that he was confined to bed and home for at least ninety days following the accident. Plaintiff states that he sought medical treatment within a week after the accident when he started physical therapy which he purportedly continues to receive. Plaintiff testified that he still has pain in his lower back and stiffness in his neck, when he does not receive therapy, occasional numbness in the palm of his right hand and pain in his left leg. With respect to activities, plaintiff testified that he can no longer walk the same distance on the track as before the accident, and can no longer do any lifting.

The Court finds that the reports of defendant’s examining physicians, are sufficiently detailed in the recitation of the various clinical tests performed and measurements taken during the examinations, so as to satisfy the Court that an “objective basis” exists for their opinions. The Court finds that the alleged restricted range of motion of five degrees of plaintiff’s cervical

spine on flexion and extension, and lateral bending is insufficient to raise an issue of fact. Accordingly, the Court finds that defendant has made a *prima facie* showing that plaintiff Thomas Gilroy did not sustain a serious injury within the meaning of **Insurance Law §5102(d)**. Consequently, the burden shifts to plaintiff to come forward with some evidence of a “serious injury” sufficient to raise a triable issue of fact. **Gaddy v. Eyler**, 79 NY2d 955, 957.

Plaintiff submits an affirmed report of Ali E. Guy, MD, dated March 4, 2008, covering an examination of that date. Dr. Guy reports that plaintiff was first seen by him on May 9, 2006 when he was started on a course of physical therapy. Dr. Guy states that plaintiff had a total of eight trigger point injections (the Court notes that plaintiff testified that he did not receive any type of injection). Dr. Guy also reports that plaintiff had EMG studies of the upper and lower extremities which revealed cervical radiculopathies, and MRIs of the cervical and lumbar spines which revealed central disc herniations at L/1 and L/2 and disc bulges in the cervical and lumbar spines.

Upon examination of the neck, Dr. Guy noted, on passive range of motion, lateral flexion of 0 to 20 degrees (normal 0 to 40 degrees) and lateral rotation of 0 to 30 degrees (normal 0 to 60 degrees) and stated that “all other ranges are normal.” With respect to the back, Dr. Guy reported passive range of motion as follows: extension of 0 to 15 degrees (normal 0 to 30 degrees), flexion 0 to 45 degrees (normal 0 to 90 degrees) and straight leg raising of 75 degrees with pain (normal 0 to 90 degrees). Dr. Guy also noted moderate tenderness, moderate spasm and multiple trigger points in both the neck and back. Dr. Guy stated that “active range of motion and manual muscle power testing is within normal limits for all four extremities.” Dr. Guy noted that he reviewed the “old MRI studies” and compared them to the present MRI and EMG studies, and found that plaintiff has a significant worsening with new injuries at L1-L2 which reveal a new herniation rather than a bulge. Dr. Guy also opines that the “prior preexisting pathologies have been exacerbated” with a new level of C5-C6 cervical radiculopathy. Dr. Guy also states that these injuries are permanent in nature and are causally related to the accident.

It is the determination of this Court that plaintiff has failed to submit *objective* medical evidence (of either a quantitative or qualitative nature) sufficient to raise a triable issue as to whether or not he sustained a “serious injury” within the meaning of **Insurance Law §5102(d)**. “Even where there is objective medical proof, when additional contributory factors interrupt the

chain of causation between the accident and claimed injury—such as a gap in treatment, an intervening medical problem or a pre-existing condition—summary dismissal of the complaint may be appropriate.” **Pommells v. Perez**, 4 NY3d 566, 572.

Here, plaintiff presents no evidence to refute the findings by Dr. Fisher that plaintiff has degenerative changes in his cervical and lumbar spines. Dr. Guy only states that he reviewed the “old MRI studies” and that plaintiff had a significant worsening with a herniation on L1-L2 which was previously a bulge, and a new level of right C5-C6 radiculopathy. The Court notes that Dr. Guy’s conclusion as to new changes in plaintiff’s cervical spine is inconsistent with Dr. Guy’s statement in another portion of his affirmation that plaintiff’s cervical MRI of June 1, 2006 was “unchanged when compared to the prior study of September 29, 2004.” In any event, Dr. Guy does not address Dr. Fisher’s findings of degeneration in both the 2006 MRIs and the two prior sets of MRIs. This lack of evidence as to causation renders plaintiff’s claim that his alleged injuries occurred as a result of the accident highly speculative. “Plaintiff had the burden to come forward with evidence addressing defendant’s claimed lack of causation.” **Pommells v. Perez**, *supra* at 580; *See Siegel v. Sumaliyev*, 46 AD3d 666; **Roman v. Fast Lane Car Service, Inc.**, 46 AD3d 535; **Abreu v. Bushwick Building Products & Supplies, LLC**, 43 AD3d 1091; **Young Soo Lee v. Troia**, 41 AD3d 469; **Gomez v. Epstein**, 29 AD3d 950; **Bycinthe v. Kombos**, 29 AD3d 845; **Kaplan v. Vanderhans**, 26 AD3d 468; **Giraldo v. Mandanici**, 24 AD3d 419; **Lorthe v. Adeyeye**, 306 AD2d 252. With respect to plaintiff’s prior accidents and resultant injuries, Dr. Guy states that he reviewed the September 29, 2004 MRI of plaintiff’s cervical spine and compared said films to plaintiff’s June 1, 2006 cervical spine MRI. However, although Dr. Guy concluded that there was exacerbation and progression of plaintiff’s lumbar spine condition, there is no indication that Dr. Guy reviewed any prior lumbar spine MRIs. In addition, Dr. Guy provides no medical evidence, other than a conclusory statement regarding plaintiff’s September 29, 2004 cervical spine MRI, to support his comparison of plaintiff’s cervical and lumbar spine before and after the subject accident. *See Luciano v. Luchsinger*, 46 AD3d 634. Dr. Guy also fails to discuss any prior treatment rendered to plaintiff. In fact, despite plaintiff’s deposition testimony that he received treatment by Dr. Guy in connection with the prior accidents, Dr. Guy states that on May 9, 2006, plaintiff was examined in his office for the first time.

In addition, plaintiff has presented no competent medical evidence providing range of motion results or any other results contemporaneous with the accident. *See Ferraro v. Ridge Car Service*, 49 AD3d 498; *Shvartsman v. Vildman*, 47 AD3d 700. Dr. Guy merely states in narrative form the results of MRIs and EMGs conducted on plaintiff without providing any examination results. The Court notes that other than the limited range of motion findings set forth in Guy's report, the report is conclusory and fails to specify the objective tests performed. *See Patalano v. Curreri*, 30 AD3d 497; *Vazquez v. Basso*, 27 AD3d 728; *Edwards v. New York City Transit Authority*, 17 AD3d 628. Plaintiff also fails to submit any MRI or EMG reports, and as such, the affirmation of Dr. Guy is therefore purportedly based, in part, on unsworn reports of other physicians. *See Gonzales v. Fiallo*, 47 AD3d 760; *Ali v. Mirshah*, 41 AD3d 748; *Phillips v. Zilinsky*, 39 AD3d 728; *Sammut v. Davis*, 16 AD3d 658; *Garces v. Yip*, 16 AD3d 375; *Friedman v. U-Haul Truck Rental*, 216 AD2d 266. In addition, plaintiff has not submitted affirmations from many of the other physicians and medical professionals referred to by Drs. Cohen and DeJesus (such as, Drs. Salayka, Goldberg, Ghazali and Lopez).

There is also insufficient evidence that plaintiff's alleged injuries are permanent §5102(d)(7)). Dr. Guy's assertion that plaintiff's injuries "are permanent in nature" is conclusory as he fails to offer any evidence of permanency. "Mere repetition of the word 'permanent' in the affidavit of a treating physician is insufficient to establish 'serious injury' and [summary judgment] should be granted for defendant where plaintiff's evidence is limited to conclusory assertions tailored to meet statutory requirements." *Lopez v. Senatore*, 65 NY2d 1017, 1019. *See also, Grossman v. Wright*, 268 AD2d 79; *Lincoln v. Johnson*, 225 AD2d 593; *Orr v. Miner*, 220 AD2d 567. In addition, Dr. Guy's statement that plaintiff was out of work from May 4, 2006 until August 14, 2006 is in direct contradiction to plaintiff's deposition testimony that he did not miss any time from work as a result of the accident.

Moreover, plaintiff's complaints of subjective pain do not by themselves satisfy the "serious injury" requirement of the no-fault law. *Scheer v. Koubek*, 70 NY2d 678; *Ranzie v. Abdul-Massih*, 28 AD3d 447; *Picott v. Lewis*, 26 AD3d 319; *Nelson v. Amicizia*, 21 AD3d 1015; *Kivlan v. Acevedo*, 17 AD3d 321; *Rudas v. Petschauer*, 10 AD3d 357; *Barrett v. Howland*, 202 AD2d 383. Plaintiff's affidavit, sworn to on February 16, 2008, wherein he attests that he sustained "serious, severe and protracted personal injuries" is entirely conclusory

and does not raise an issue of fact.

Although the report of defendant's radiologist covering a review of plaintiff's MRIs reveal disc bulges and small herniated discs in the cervical spine and disc bulges in the lumbar spine, the Court notes that the existence of a radiologically confirmed disc injury alone will not suffice to defeat summary judgment. See **Pommells v. Perez**, 4 NY3d 566, 574; **Patterson v. NY Alarm Response Corp.**, 45 AD3d 656; **Bravo v. Rehman**, 28 AD3d 694; **Howell Reupke**, 16 AD3d 377; **Kearse v. New York City Transit Authority**, 16 AD3d 45. Plaintiff has also failed to submit competent medical evidence that the injuries that he sustained rendered him unable to perform all of his usual and customary daily activities for ninety days of the first one hundred eighty days following the accident.

Plaintiff's cross motion on the issue of liability

The certification order, dated October 9, 2007, does not specifically indicate the period for making summary judgment motions. Accordingly, the Court will consider plaintiff's cross motion as it was made within 120 days after filing of the note of issue. **CPLR 3212(a)**.

On August 22, 2007, plaintiff testified at a deposition that the accident occurred while he was slowing down to make a left turn with his signal on, when he was hit by defendant's vehicle. In an affirmation, dated February 29, 2008, plaintiff's attorney claims that "since [defendant] admitted that she was unable to stop in time to avoid a collision, it is clear that the defendant was following too closely under the traffic conditions at the time of the accident." Plaintiff's assertion establishes, although barely, a *prima facie* entitlement to judgment as a matter of law. However, in opposition, defendant's attorney claims that defendant never stated that she was unable to stop in time to avoid the accident. Defendant submits portions of her deposition testimony wherein she testified that plaintiff was proceeding slowly and "did not look where he was going and then all of a sudden started to turn and slammed on his brakes." Defendant also testified that plaintiff failed to use any turning devices.

In this case, the Court finds that defendant's assertion that plaintiff started to turn suddenly without signaling is a sufficient explanation to create an issue of fact. See **Vehicle and Traffic Law §1163(b)**. On the basis of the foregoing, plaintiff's motion for summary judgment on the issue of liability is denied. See **Nunez v. Staley**, 48 AD3d 533; **Tepoz v. Sosa**, 241 AD2d 449.

In this case, the Court finds that defendant's assertion that plaintiff started to turn suddenly without signaling is a sufficient explanation to create an issue of fact. See **Vehicle and Traffic Law §1163(b)**. On the basis of the foregoing, plaintiff's motion for summary judgment on the issue of liability is denied. See **Nunez v. Staley**, 48 AD3d 533; **Tepoz v. Sosa**, 241 AD2d 449.

The Court has examined the parties' remaining contentions and find them to be without merit.

On the basis of the foregoing, it is

ORDERED, defendant JESSICA A. BUCKLEY's motion for summary judgment dismissing the complaint of plaintiff THOMAS GILROY, on the grounds that plaintiff failed to sustain a "serious injury" within the meaning of **Insurance Law §5102(d)** is **granted**; and it is further

ORDERED, plaintiff THOMAS GILROY's cross motion for summary judgment on the issue of liability is **denied**.

Defendant shall serve plaintiff with a copy of this Order within 15 days after entry of this Order in the records of the Nassau County Clerk.

This constitutes the order of the Court.

Dated: *June 11*, 2008 ENTER:

[Handwritten Signature]
J.S.C.

ENTERED
JUN 27 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE