

Costen v Dunne Cab Corp.

2008 NY Slip Op 31923(U)

June 9, 2008

Supreme Court, New York County

Docket Number: 0103644/2006

Judge: Deborah A. Kaplan

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: DEBORAH A. KAPLAN
J.S.C.
Justice

PART 22

Index Number : 103644/2006

COSTEN, RONALD

vs.

DUNNE CAB

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

CALAZY

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED _____

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

FILED

Cross-Motion: Yes No

JUN 25 2008

Upon the foregoing papers, it is ordered that this motion

COUNTY CLERK'S OFFICE
NEW YORK

*Motion is resolved as per
attached order.*

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JUN 25 2008
IAS MOTION
SUPPORT OFFICE

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JUN 19 2008
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SUPPORT OFFICE

Dated: 6-9-08

JUN 09 2008

Deborah Kaplan
DEBORAH A. KAPLAN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE *MDPA*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

6/25/08

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 22

-----X
RONALD COSTEN and ARIELLIA SMITH

Plaintiffs,

-against-

Index No.
103644/06

DUNNE CAB CORP. and ISMAILA FOFANA,

Defendants.

FILED

JUN 25 2008

CLERK'S OFFICE
COUNTY OF NEW YORK

-----X
DEBORAH KAPLAN, J. :

Defendants move for summary judgment dismissing all claims brought against them in this personal injury case.

The complaint alleges that plaintiff Ronald Costen suffered serious injuries as a result of a collision of the parties' vehicles at the intersection of 126th Street and Madison Avenue in Manhattan on December 11, 2003. Plaintiff Ariellia Smith interposes a loss of consortium claim.

In their answer, defendants admitted ownership and operation of one of the vehicles involved in the accident and raised various affirmative defenses, including the defense that Costen did not sustain a "serious injury" pursuant to Section 5102 (d) of the Insurance Law.

Defendants now move for summary judgment based on the "serious injury" defense. According to plaintiffs' verified bill of particulars dated May 23, 2006, Costen sustained the following soft tissue injuries: C2-C3 annular disc bulge; bulging annulus at L3-L4; cervical and lumbar radiculopathy; muscle spasms; left moderate acute C5-C6-C7 radiculopathy of the cervical spine; left and right moderate acute L3-L4-L5-S1 radiculopathy of the lumbar spine and disc bulge at L4-L5 and L5-S1.

On July 31, 2007, Dr. R.C. Krishna, a neurologist, examined Costen on behalf of the defendants. Dr. Krishna states in his report that the examination of Costen's cranial nerves revealed round and regular pupils reactive to light and accommodated directly. The extraocular movements were full; fundi were unremarkable; and visual acuity, facial sensation and muscular expression were normal. The strength of the head, neck and jaw were normal and tongue movements were normal. The corneal reflex, gag reflex and the remainder of the brainstem reflexes were all normal and symmetrical bilaterally.

Examination of Costen's station and gait revealed the volume, tone, strength and range of motion of all muscles to be within normal limits; reflexes were symmetrical and equal and the plantar responses were flexor bilaterally. Rapid alternating and rhythmic movements were normal bilaterally; finger-to-nose and heel-to-shin tests were normal bilaterally; and there were no fasciculations, tremors or muscle tenderness.

Examination of Costen's cervical and lumbosacral spine revealed a normal range of motion. Dr. Krishna states that he diagnosed Costen with a resolved cervical and lumbar strain injury. He avers that there was no neurological disability or contraindication preventing Costen from continuing gainful employment; that there were no neurological deficits identifiable on examination that would constitute a disability or permanency; and that Costen did not require any further diagnostic testing or physical therapy.

Defendants rely on the findings of this affirmed report to demonstrate that they have submitted competent medical evidence in admissible form to satisfy their burden of showing that Costen did not suffer a serious injury as a matter of law.

Section 5102 (d) provides categories of serious injury. The relevant categories, according

to defendants, are :

a personal injury which results in ... 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.

Defendants contend that none of the aforesaid categories can be applied to Costen. They argue that their medical report disputes all allegations that Costen sustained a serious injury.

In opposition, plaintiffs argue that Costen sustained a "serious injury" under at least one category of the statutory definition. They plaintiffs submit an affidavit from Costen in which he states that he experienced extreme pain in his head, neck, chest, ribs and lower back while at the scene of the accident . Despite his condition, he drove his car to Harlem Hospital and entered the emergency room. X-rays were taken of his head, chest and ribs. He was instructed to seek follow up medical treatment with his private doctor.

The following day, he began treatment with Dr. Michael Tugetman at Park Health Center, located in South Ozone Park, New York. After conducting a physical examination, which included range of motion tests of his neck and back, Dr. Tugetman diagnosed him as suffering from head trauma, cervical and lumbar spine sprain, left chest contusion and post concussion syndrome. Dr. Tugetman advised him to have MRI scans taken of his cervical and lumbar spine and recommended that he start an intensive course of physical therapy. He also prescribed analgesic and anti-inflammatory medications.

Costen underwent MRI scans on his neck and lower back, which revealed a bulging disc

in his neck and three bulging discs in his lower back. Costen also underwent physical therapy three times per week for approximately the next five months. Costen states that at the end of the five months of therapy, the restriction of movement in his neck and lower back had not improved.

Costen was re-examined by Dr. Tugetman, and it was revealed that the range of motion of his neck remained significantly limited. He contends that as a result of his accident, he has not been able to perform a vast majority of the daily activities that he had partaken in prior to the accident. To this date, he claims to have pain in his neck and lower back.

Plaintiffs submit an affirmation from Dr. Tugetman, along with medical records related to Costen's treatment. Dr. Tugetman states that Costen came into his care for a five month period from December 12, 2003 to May 5, 2004. He states that he directed Costen to stay out of work after the accident because Costen was physically unable to perform the duties required by his job as a truck driver. Costen was thus unable to work for approximately four months.

After four months of physical therapy, Dr. Tugetman re-evaluated Costen and found that his cervical spine range of motion was more restricted due to pain and spasm, as compared with a previous examination. Dr. Tugetman found that despite undergoing therapy, the restriction of range of motion and loss of use of Costen's cervical and lumbar spine persists over the course of his treatment. Dr. Tugetman concludes that the injuries Costen suffered as a result of the accident constitute a significant limitation of the use of motion of his cervical and lumbar spine. According to Dr. Tugetman, Costen was prevented from performing most of his customary daily activities for a period of more than ninety days during the one hundred and eighty days immediately following the accident.

In reply, defendants assert that they have met their initial burden of proof by submitting Dr. Krishna's affirmed report, which concluded that plaintiff had a normal condition and no limitation of motion.

Based on the evidence submitted by plaintiffs, including the medical reports, the court finds that they have raised an issue of fact as to whether Costen was disabled pursuant to the 90 days/180 days disability category of section 5102 (d). The affidavit of Costen and the affirmation of Dr. Tugetman specifically assert that Costen was unable to lift or push objects at work or at home, was unable to play basketball or take walks on a regular basis and even had difficulty sitting and sleeping.

Thus, plaintiffs have raised an issue of fact as to whether Costen suffered a serious injury within the meaning of Insurance Law § 5102(d).

Accordingly, it is

ORDERED that the defendants' motion for summary judgment is denied.

Dated: June 9, 2008

ENTER:

FILED

JUN 25 2008

**COUNTY CLERK'S OFFICE
NEW YORK**

Deborah K.

J.S.C.