

Gaska v Metropolitan Transp. Auth.

2008 NY Slip Op 32637(U)

September 19, 2008

Supreme Court, Nassau County

Docket Number: 15403-04

Judge: Michele M. Woodard

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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LISA CONDOS GASKA and RICKY J. GASKA,

Plaintiffs,

-against-

MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 16
Index No.: 15403/04
Motion Seq. No.: 03

METROPOLITAN TRANSPORTATION AUTHORITY,
METROPOLITAN TRANSPORTATION AUTHORITY
LONG ISLAND BUS, METROPOLITAN SUBURBAN
BUS AUTHORITY, AND LANCE A. HAYNES,

DECISION AND ORDER

Defendants.

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The Defendants move by Notice of Motion for an Order granting them Summary Judgment. The Plaintiff opposes the Defendants' application.

On November 6, 2003, at approximately 6:15 p.m., the Plaintiff Lisa Condos-Gaska pulled her leased Mercedes vehicle from a Rockville Centre train station parking lot onto Banks Avenue, where she was involved in an accident with an MTA Long Island bus which had been proceeding south on Banks (L. Gaska [PAH] 13-14; 16-17, 55; Dep., 26).

After the accident, the Plaintiff claims to have sought treatment from her primary care physician – complaining of neck, chest, back and hip pain – and treated with him for some six weeks, after which she received physical therapy for some six months. Later, she came under the care of an orthopedist, a Dr. Michael Shapiro, who ordered MRI studies which allegedly showed, *inter alia*, herniated discs at the C5-6 and C6-7 level. The Plaintiff claims that she later (in 2004-2005), received injections for neck pain, underwent massage and acupuncture therapy, and treated with a chiropractor (Gaska PAH, 60-66, 70-71; Dep., at 92-94, 104, 106-107, 139). The Plaintiff apparently last sought treatment from Dr. Shapiro in August of 2006.

The record indicates that after the subject accident, the Plaintiff, as driver, was involved in another automobile accident in July of 2005 (Gaska PAH, 75; Dep., 97-102; Dep., 102).

In August of 2005, the Plaintiff filed an application for No-Fault benefits with State Farm Insurance Company in connection with the second accident, in which she identified "back and neck pain" as the injuries sustained therein (Defs' Exh., "K"). Significantly, an Insurance Department "Verification of Treatment" form, executed in late August, 2005 by the Plaintiff and her orthopedist,

affirms that the injuries identified on the form, which included cervical strain/sprain, cervical radiculitis, disc displacement and neck cervicgia – were conditions which occurred “solely as a result of this automobile accident,” *i.e.*, the second July, 2005 accident (Defs’ Exh., “K”, “L”).

Thereafter, the injured Plaintiff and her husband Ricky J. Gaska, commenced the within personal injury action alleging, *inter alia*, that Lisa Gaska sustained a serious injury within the meaning of Insurance Law § 5102[d].

As a result of the soft tissue injuries sustained, the Plaintiff missed no more than a few days of work during the six months immediately following the incident (Gaska PAH, 80-81; Dep., 135; BOP ¶, 22).

Discovery is now complete and the MTA Defendants move for summary judgment dismissing the complaint. The motion should be granted.

Preliminarily, while the subject motion was made beyond the 60-day deadline imposed in the Court’s June 10, 2007 certification order (Defs’ Exh., “G”), the record substantiates the Defendants’ assertion that significant discovery was outstanding, delayed and/or materially incomplete at the time the Plaintiffs’ own note of issue was belatedly filed some three months after the deadline imposed by this Court (*see*, Leiter Aff., ¶¶ 3-27) (*Sclafani v. Washington Mut.*, 36 AD3d 682 [2d Dept 2007] *cf.*, *Gonzalez ex rel. Gonzalez v 98 Mag Leasing Corp.*, 95 NY2d 124, 129 [2000]; *Olivier v Rodney*, 27 AD3d 631, 632 [2d Dept 2006] *see generally*, *Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725, 726-727 [2004]; *Brill v City of New York*, 2 NY3d 648, 652 [2004]).

It is settled that “[s]ignificant outstanding discovery may, in certain circumstances, constitute good cause for the delay in making a motion for summary judgment” (*Herrera v Felice Realty Corp.*, 22 AD3d 723 [2d Dept 2005]; *Burnell v Huneau*, 1 AD3d 758, 760 [2d Dept 2005] *see also*, *Sclafani v Washington Mut.*, *supra*; *Chou v A to Z Vending Service Corp.*, 36 AD3d 745 [2d Dept 2007]; *Gaffney v BFP 300 Madison II, LLC*, 18 AD3d 403 [1st Dept 2005]; *Kunz v Gleeson*, 9 AD3d 480 [2d Dept 2004]; *Feliciano v Kameraj*, 15 Misc.3d 1127(A), 2007 WL 1223455 at 2 [Supreme Court, Richmond County 2007]).

The Court notes further that the Plaintiffs’ opposing affirmation does not address the specific discovery allegations advanced by the Defendants in support of their “good cause” claim (Leiter Aff., ¶¶ 3-27; Reply Aff., ¶ 5), but rather, opposes the Defendants’ assertions in a wholly conclusory and non-analytical fashion (DeVito Aff., in Opp., ¶ 7).

In short, and upon the exercise of its discretion, the Court concludes that the Defendants have satisfactorily established the existence of “good cause” within the meaning of CPLR §3212[a] (*Chou v A to Z Vending Service Corp.*, *supra*).

Turning to the merits of the motion to dismiss, the Court agrees that the Defendants have demonstrated their *prima facie* entitlement to judgment as a matter of law dismissing the Plaintiffs’ serious injury claims (*e.g.*, *Kuchero v Tabachnikov*, ___ AD3d ___, 2008 WL 4168421 [2d Dept. 2008]; *Seebaran v Mendonca*, 51 AD3d 658; *Doherty v Ajaib*, 49 AD3d 800 [2d Dept 2008]).

Specifically, the Defendants have submitted the affirmed report of their examining neurologist, Dr. Warren Cohen, who conducted a broad range of specific testing procedures and found that “no residual or permanent injury” existed, *i.e.*, he discerned no objectively verifiable limitations; no existing range of motion deficits, and indeed, no remaining sequella of any sort in the connection with the subject accident (Defs’ Exh., “N”; Cohen Report at 3-5)(*Burgos v Vargas*, 33 AD3d 579 [2d Dept 2006]).

The Defendants have also submitted the Plaintiffs’ depositions and bill of particulars, in which she conceded, *inter alia*, that after the accident she missed, at most, a few days of work and was confined to bed for approximately one week (Gaska PAH, 80-81; Dep., 135; BOP, ¶ 22)(*Kouros v Mendez*, 41 AD3d 786 [2d Dept 2007]). Also of import are the 2005 No-Fault reports relating to the 2005 accident (Defs’ Exh., “L”), which specifically affirm that the injuries identified on the form – including alleged cervical radiculitis, cervical strain and neck pain or “cervicalgia” – were solely attributable to the 2005 accident (Defs’ Exh., “L”).

In response, the Plaintiffs’ opposing submissions have failed to raise a triable issue of fact with respect to their claims of serious injury.

The Court notes that Dr. Shapiro’s June 2008 report – executed some 22 months after his last treatment was rendered – (Report at 2) does not contain quantified, range of motion testing results or reference to specific, objective tests. Rather, his report merely opines in generalities that the injured Plaintiff is still experiencing significant and continued pain, spasm and has “diminished flexibility extension rotation and lateral bending” (Report at 2) (*see, Kuchero v Tabachnikov, supra; Fiorillo v Arriaza*, 52 AD3d 465 [2d Dept 2008]; *Casas v Montero*, 48 AD3d 728 [2d Dept 2008]). Nor has Dr. Shapiro addressed the medical significance or import of the second accident in his report, thereby rendering the alleged causal relationship between the subject accident and the injuries claimed herein, speculative and unproven (*see, Berkowitz v Taylor*, 47 AD3d 740 [2d Dept 2008]; *Luckey v Bauch*, 17 AD3d 411 [2d Dept 2005]; *Howell v Reupke*, 16 AD3d 377, 378 [2d Dept 2005]; *Mooney v Edwards*, 12 AD3d 424, 425 [2d Dept 2004] *cf., Pommells v Perez*, 4 NY3d 566, 574-575 [2005]). Similarly, the report makes no mention of the 2005 No-Fault verification forms, which affirm that the cervical, disc displacement and neck injuries identified therein were solely attributable to the July 2005 accident.

There is also evident in the record, an unexplained, 22-month gap between the Plaintiff’s last visit to Dr. Shapiro in August of 2006 and the subsequent post-motion examination he performed in June of 2008 (*McConnell v Ouedraogo*, 24 AD3d 423, 424 [2d Dept 2005]; *Bruce v New York City Transit Authority*, 16 AD3d 608, 609 [2d Dept 2005]; *Mooney v Edwards, supra, see also, Pommells v Perez, supra; Seck v Minigreen Hacking Corp.*, 53 AD3d 608, 609 [2d Dept 2008])(Shapiro Report at 2).

Further, while bulging or herniated discs were observed in the Plaintiff’s MRI studies, the mere existence of a bulging disc is not by itself evidence of a serious injury, where as here, there is absent adequate proof showing the extent of the alleged physical limitations resulting from the disc injury and its duration (*Perdomo v Scott*, 50 AD3d 1115 [2d Dept 2008] *see also, Casas v Montero, supra; Roman v Fast Lane Car Service, Inc.*, 46 AD3d 535, 536 [2d Dept 2007]; *Rodriguez v Cesar*, 40 AD3d 731,732 [2d Dept 2007]).

Additionally, no opinion has been offered with respect to the issue of causation in connection with the disc bulges discerned (*Smeja v Fuentes*, 54 AD3d 326, 328 [2d Dept 2008]; *Marrache v Akron Taxi Corp.*, 50 AD3d 973, 974 [2d Dept 2008]; *Endzweig-Morov v MV Transp., Inc.*, 50 AD3d 946, 948 [2d Dept 2008]; *Penaloza v Chavez*, 48 AD3d 654, 655 [2d Dept 2008]; *Howell v Reupke, supra*).

Lastly, the Plaintiff has failed to raise a triable issue of fact with respect to the claim that she sustained a medically-determined injury of a nonpermanent nature which prevented her from performing her usual and customary activities for 90 of the 180 days immediately following the accident (*see, Laurent v McIntosh*, 49 AD3d 820, 821-822 [2d Dept 2008]; *Roman v Fast Lane Car Serv, Inc.*, 46 AD3d 535, 536 [2d Dept 2007]; *Sainte-Aime v Ho*, 274 AD2d 569 [2d Dept 2000]).

The Plaintiff concededly missed only a few days from work (*see, Camacho v Dwelle*, ___ AD3d ___, 2008 WL 4170389 [2d Dept 2008]; *Jones v Gooding*, 50 AD3d 968 [2d Dept 2008]; *Rico v Figueroa*, 48 AD3d 778, 778 [2d Dept 2008]; *Furrs v Griffith*, 43 AD3d 389 [2d Dept 2007]), and the record does not otherwise establish that she suffered from a medically determined injury that prevented her from performing her usual activities for the statutory period (*Perdomo v Scott, supra*; *Morris v Edmond*, 48 AD3d 432, 433 [2d Dept 2008]; *Furrs v Griffith, supra*; *Amato v Fast Repair Inc.*, 42 AD3d 477, 478 [2d Dept 2007]; *Sainte-Aime v Ho*, 274 AD2d 569 [2d Dept 2000]).

In light of the foregoing, the injured Plaintiff's serious injury claim, as well as the related derivative (second) cause of action interposed on behalf of co-Plaintiff Ricky J. Gaska, must be dismissed.

The Court has considered the Plaintiffs' remaining contentions and concludes that they are insufficient to defeat the Defendants' motion for summary judgment.

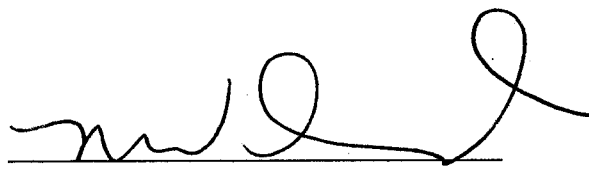
Accordingly, it is,

ORDERED that the motion pursuant to CPLR §3212 by the Defendants for Summary Judgment dismissing the Complaint, is **granted**.

This constitutes the **DECISION** and **ORDER** of the Court.

DATED: September 19, 2008
Mineola, N.Y.

ENTER:



HON. MICHELE M. WOODARD
J.S.C.
X X X

H:\DECISION - SERIOUS INJURY\Gaska v Metropolitan Transportation.wpd

ENTERED
SEP 25 2008
NASSAU COUNTY
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