

Gargiulo v Wilson

2008 NY Slip Op 33027(U)

November 5, 2008

Supreme Court, Suffolk County

Docket Number: 2952/2007

Judge: William B. Rebolini

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Short Form Order

SUPREME COURT - STATE OF NEW YORK
CALENDAR CONTROL PART - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Thomas Gargiulo, Ryan Gargiulo and Larry Sog,
Plaintiffs,

Motion Sequence No.: 002; MD
Motion Date: 4/30/08
Submitted: 6/10/08

-against-

Index No.: 2952/2007

David Wilson,

Defendants.

Attorney for Plaintiff:

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Upon the following papers numbered 1 to 36 read on this motion by defendant for summary judgment: Notice of Motion and supporting papers, 1 - 25; Answering Affidavits and supporting papers, 26 - 34; Replying Affidavits and supporting papers, 35 - 36.

Before the Court is a motion by the defendant for summary judgment dismissing the complaint on the asserted grounds that none of the plaintiffs have established a serious injury as set forth under the Insurance Law §5104(d).

Plaintiff, Thomas Gargiulo, was the driver of a motor vehicle and was injured when his stopped vehicle was hit from the rear. Ryan Gargiulo and Larry Sog were passengers in the Gargiulo vehicle. The accident took place on September 28, 2006. None of the plaintiffs went to the hospital from the scene of the accident.

Thomas Gargiulo, complaining of neck and back pain, sought chiropractic treatment the day following the accident. He treated with Dr. Michael Genovese from September 29, 2006 until April

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30, 2008. The report of Dr. Genovese does not indicate the nature of the treatment other than to state that it was conservative. A cervical MRI taken on November 29, 2006 revealed a posterior subligamentous disc bulge at C5/6 indenting the ventral CSF space. An MRI of the lumbar spine taken on November 13, 2006 revealed posterior disc bulging at L5/S1 with bilateral foraminal extension and encroachment and posterior disc bulge at L4/5. Thomas Gargiulo also treated with a physiatrist. His EMG study taken on January 5, 2007 revealed a right S1 radiculopathy. He was an 18 year old student at the time of the accident and states that he was unable to play on a college basketball team. He can no longer rock climb or surf and has difficulty sleeping. He claims that as a result of the accident he suffered a significant limitation of a body function or system, a permanent partial disability and that he was unable to perform his daily functions for 90 out of the first 180 days following the accident.

Ryan Gargiulo also went to see Dr. Genovese the day following the accident, as he was experiencing neck and back pain. He treated with Dr. Genovese from September 29, 2006 until April 22, 2008. Dr. Genovese's report does not indicate the nature of the treatment other than to state that it was conservative. An MRI of the lumbar spine taken November 29, 2006 revealed posterior disc herniations T11/12, T12/L1 with cord contact. An MRI of the cervical spine taken on November 13, 2006 revealed posterior subligamentous disc bulge C3/4 indenting the ventral CSF space without cord contact or foraminal impingement. Ryan also went to see Dr. Shapiro but there are no reports or records proffered. Ryan was 18 years old at the time of the accident and as a result of the accident he experienced pain throwing the shot put on the track team at college, lifting weights, running, trouble sleeping, playing basketball, swimming and sitting or standing. He claims that as a result of the accident he suffered a significant limitation of a body function or system, a permanent partial disability and that he was unable to perform his daily functions for 90 out of the first 180 days following the accident.

Larry Sog also sought treatment for neck and back pain one day after the accident from Dr. Genovese and continued treatment until May 12, 2008. Dr. Genovese's report does not indicate the nature of the treatment other than to say that it was conservative. An MRI of the cervical spine taken on November 29, 2006 revealed straightening of cervical lordosis suggesting reflex muscle spasm. An MRI of the of the lumbar spine taken on November 13, 2006 revealed posterior disc herniation L3/4 and L 4/5 indenting the thecal sac without central canal or foraminal stenosis, and annular disc bulge L5/S1 indenting the thecal sac. Sog consulted with Dr. Shapiro on December 13, 2006 who found sciatica, sacral torsion and pelvic obliquity, lumbosacral and cervical sprain/strain, TMJ dysfunction, and right patellofemoral syndrome. He recommended massage therapy. An EMG performed on December 27, 2006 was normal. Larry was 18 years old at the time of the accident and states that since the accident he has been unable to play recreational sports. He claims that as a result of the accident he suffered a significant limitation of a body function or system, a permanent partial disability and that he was unable to perform his daily functions for 90 out of the first 180 days following the accident.

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Under the law in an action to recover for personal injuries resulting from an automobile accident, plaintiff has the burden to make a prima facie showing of serious injury within the meaning of the Insurance Law §5102 (d). Whether the burden has been met is initially a matter of law for determination by the court (see, Licari v. Elliott, 57 NY2d 230 [1982]). As the moving party, a defendant initially has the burden to establish that the plaintiff did not sustain a serious injury within the meaning of the statute.

A defendant who submits admissible proof that a plaintiff has a full range of motion and that he or she suffers from no disabilities has established a prima facie case that the plaintiff did not sustain a serious injury within the meaning of Insurance Law §5102(d), despite the existence of an MRI report which shows herniated or bulging discs (see, Meely v. 4 G's Truck Renting Co., Inc., 16 AD3d 26 [2nd Dept., 2005]). This holding naturally follows from the rule that the mere existence of a bulging or herniated disc is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from the disc injury and its duration. Where the plaintiff claims soft tissue injury to the neck and back, the case law requires objective proof of both the pain and the limitation of movement. Proof of a disc herniation alone without objective proof of limitation of movement is insufficient to meet the threshold (see, Uber v. Heffron, 286 AD2d 729 [2nd Dept., 2001]; Descovich v. Blieka, 279 AD2d 499 [2nd Dept., 2001]); as is a doctor's observations of pain accompanying by reduced flexion unless accompanied by objective proof such as x- rays, MRIs, straight-leg or Laseque tests, and any other similarly recognized tests or quantitative results based on a neurological examination (see, Grossman v. Wright, 268 AD2d 79 [2nd Dept., 2000]).

To establish a claim under the 90/180 days category, the same objective medical proof is required to establish that the plaintiff suffered an impairment of a non-permanent nature which prevented him or her from performing substantially all of the material acts which constituted his usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury (see, Toure v. Avis Rent A Car Systems, Inc., 98 NY2d 345 [2002]).

Regarding Thomas Gargiulo, defendant proffers the report of a radiologist who reviewed Thomas Gargiulo's MRI studies. Dr. Tantleff found that the MRI of the cervical spine revealed chronic degenerative discogenic disease and cervical spondylosis without evidence of disc bulge protrusion or herniation; that the MRI of the lumbar spine was normal with no evidence of disc bulge, protrusion or herniation; and that there was no evidence of mass effect on the thecal sac or exiting nerve roots. These findings are in direct contradiction of the sworn reports of Dr. Mayerfield submitted by Thomas Gargiulo. Thomas was also examined on February 29, 2008 by defendant's orthopedist whose diagnosis was status post cervical and lumbosacral strain without any limitations in movement. He found that the MRI studies cannot be said to be causally related to the accident and that the EMG study was not consistent with his physical examination. Accordingly, defendant has met his initial burden to show that Thomas Gargiulo did not meet the threshold for serious injury, shifting the burden to the plaintiff.

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Dr. Genovese, Thomas's treating chiropractor, found limitation in plaintiff's range of motion immediately post accident and currently. This, in addition to the sworn reports of his radiologist showing disc bulges, is sufficient to raise an issue of fact as to whether or not he suffered a significant limitation of a body function or system and/or a permanent partial disability

Regarding the category of 90/180 days, Thomas states that he was unable to play basketball. Although this may be an important part of a young person's life, he was not confined to his bed or home for 90 days (see, Below v. Randall, 240 AD2d 939 [3rd Dept., 1997]; Hemsley v. Ventura, 50 AD3d 1097 [2nd Dept., 2008]). The statement of his physician that "After I first evaluated him on 9/29/06, I disabled him for all sporting activity, especially his participation on the basketball team.." does not constitute substantially all of his daily activities and is contradicted by Thomas' testimony that no doctor told him that he could not play basketball (see, Traugott v. Konig, 184 AD2d 765 [2nd Dept., 1992]). Accordingly, plaintiff has failed to refute the defendant's proof that he was able to perform the daily activities of his life immediately post accident.

Regarding Ryan Gargiulo, defendant proffers the report of the same radiologist who reviewed Thomas Gargiulo's MRI studies. Dr. Tantleff found that the MRI of the cervical spine reveals chronic degenerative discogenic disc disease and cervical spondylosis with no evidence of disc bulge, protrusion or herniation and that the MRI of the lumbar spine was normal revealing no evidence of disc bulge, protrusion or herniation. Again, this is in contradiction of the sworn reports of Dr. Mayerfield submitted on Ryan's behalf. Ryan was also examined by defendant's orthopedist on February 29, 2008; his diagnosis was status post cervical and lumbar strain without any limitation in movement. He opines that the MRI findings cannot with any degree of medical certainty be causally related to the accident. Accordingly, defendant has met his initial burden to show that Thomas Gargiulo did not meet the threshold for serious injury, shifting the burden to the plaintiff.

Dr. Genovese, Ryan's treating chiropractor, found limitation in his range of motion immediately post accident and currently. This, in addition to the sworn reports of his radiologist showing disc herniations and bulges, is sufficient to raise an issue of fact as to whether or not he suffered a significant limitation of a body function or system and/or a permanent partial disability

Regarding the category of 90/180 days, Ryan states that he is unable to shot put, lift weights and run.. Although this may be an important part of a young person's life, he was not confined to his bed or home for 90 days (see, Below v. Randall, 240 AD2d 939 [3rd Dept., 1997]; Hemsley v. Ventura, 50 AD3d 1097[2nd Dept., 2008]). The statement of his physician that "After I first evaluated him on 9/29/06, I disabled him for all sporting activity, especially his participation on the track team as well as a shot putter...I disabled him from lifting, bending, running and squatting due to his restrictions and injuries as indicated above" does not constitute substantially all of his daily activities (see, Traugott v. Konig, 184 AD2d 765 [2nd Dept., 1992]). Accordingly, plaintiff has failed to refute the defendant's proof that he was able to perform a substantial part of his daily activities immediately post accident.

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With regard to Larry Sog, the defendant proffers the report of Dr. Tantleff, who reviewed the other plaintiffs radiological studies. He opined that Larry Sog's cervical MRI was normal revealing no evidence of disc bulge, protrusion or herniation and that the lumbar MRI was also normal revealing no evidence of disc bulge, protrusion or herniation. As noted above, by way of contrast, this plaintiff's radiologist found a disc herniation of the lumbar spine. Sog's examination by defendant's orthopedist took place on February 28, 2008 and he diagnosed status post cervical sprain, and lumbosacral sprain resolved and a lumbar disc herniation. He found no limitation of movement and that the lumbar MRI finding cannot with any degree of medical certainty, be causally related to the accident. Defendant also points to the report of Dr. Shapiro and the EMG which was normal. Accordingly, defendant met his initial burden to show that Larry Sog did not meet the threshold for serious injury shifting the burden to the plaintiff.

Dr. Genovese's report is similar to the other plaintiffs. He finds limitation of movement upon his examination post accident and currently. Mr. Sog has had to stop his sports related recreational activities. Dr. Genovese's report, when accompanied by the lumbar MRI which shows a herniation, is sufficient to raise an issue of fact that he may have suffered a significant limitation of a body function or system and/or a permanent partial disability.

Regarding the 90/180 day category, Mr. Sog has failed to meet the threshold as a matter of law. Mr. Sog was not confined to bed or home immediately after the accident and he states that he is unable to engage in certain sports. This does not constitute substantially all of his daily activities.

Summarizing the foregoing, all three plaintiffs have raised an issue of fact with respect to whether or not they suffered a significant limitation of a body function or system and or a permanent partial disability but none of them has established that they suffered an injury which prevented them from performing substantially all of their daily activities for 90 out of the first 180 days after the accident.

Accordingly, it is

ORDERED that the defendant's motion for summary judgment is in all respects denied.

Dated: November 5, 2008


HON. WILLIAM B. REBOLINI, J.S.C.