

Kosling v Sloan

2009 NY Slip Op 30822(U)

April 9, 2009

Supreme Court, Suffolk County

Docket Number: 04-29461

Judge: Sandra L. Sgroi

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 19 - SUFFOLK COUNTY

PRESENT:

Hon. SANDRA L. SGROI
Justice of the Supreme Court

MOTION DATE 10-28-08
ADJ. DATE 1-8-09
Mot. Seq. # 001 MG; CASEDISP

-----X	
PAUL KOSLING and MARLENE KOSLING,	:
	:
Plaintiffs,	:
	:
– against –	:
	:
BERNARD SLOAN and COUNTY OF SUFFOLK,:	:
	:
Defendants.	:
-----X	

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Upon the following papers numbered 1 to 44 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 23 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 24 - 42 ; Replying Affidavits and supporting papers 43 - 44 ; Other ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that defendants' motion for summary judgment dismissing the complaint is granted.

Plaintiff Paul Kosling commenced this action to recover damages for personal injuries allegedly sustained in a motor vehicle collision that occurred on Route 25 in the Town of Smithtown on February 21, 2004. His wife, plaintiff Marlene Kosling, sued derivatively for loss of services. The accident allegedly occurred when a box truck driven by plaintiff struck the right rear portion of a bus as the bus was making a left turn across plaintiff's lane of travel and into a parking lot. The bus was owned by defendant County of Suffolk and driven by defendant Bernard Sloan. By his bill of particulars, plaintiff alleges that he suffered the following injuries due to the accident: "severe ulnar [nerve] entrapment at the left elbow," ulnar neuropathy at the left elbow, and bilateral entrapment of the median nerves within the carpal tunnels. Plaintiff, a self-employed contractor who works in the construction industry, does not allege in the bill of particulars that he was confined to home or that he missed any work as a result of his alleged injuries.

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Defendants now move for summary judgment dismissing the complaint on the ground that plaintiff is precluded under Insurance Law § 5104 from recovering for non-economic loss, as he did not suffer a “serious injury” within the meaning of Insurance Law § 5102 (d). Defendants’ submissions in support of the motion include copies of the pleadings and the bills of particulars; transcripts of plaintiff’s testimony at a 50-h hearing and at an examination before trial; and a sworn medical report prepared by Dr. Edward Reiser. At defendants’ request, Dr. Reiser, a neurologist, conducted an independent examination of plaintiff on March 24, 2008 and reviewed numerous medical records related to the neurological injuries alleged in this action.

Plaintiff opposes the motion, arguing that defendants’ submissions are insufficient to show prima facie that he did not suffer a serious injury as a result of the accident. Alternatively, plaintiff asserts that evidence presented in opposition to the motion raises a triable issue of fact as to whether he sustained injuries to his left arm within the “significant limitation of use” category. In opposition, plaintiff submits, among other things, a copy of the police accident report; copies of sworn medical reports, dated July 2004, prepared by Dr. Patrick Poole; copies of sworn medical reports, dated September 2004, July 2006 and May 2007, prepared by Dr. Michael Hausman; copies of sworn medical reports, dated September 2006, prepared by Dr. Dwight Rosenstein; copies of hospital records related to plaintiff’s treatment at the emergency department of Stony Brook Hospital immediately after the accident; a copy of a medical report, dated February 2008, prepared by Dr. Isaac Cohen; and plaintiff’s own affidavit.

Insurance Law § 5102 (d) defines “serious injury” as “a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; 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.”

It is for the court to determine in the first instance whether a plaintiff claiming personal injury as a result of a motor vehicle accident has established prima facie that he or she sustained “serious injury” and may maintain a common law tort action (*see Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]; *Tipping-Cestari v Kilhenny*, 174 AD2d 663, 571 NYS2d 525 [2d Dept 1991]). A defendant seeking summary judgment on the ground that a plaintiff’s negligence claim is barred under the No-Fault Insurance Law bears the initial burden of establishing a prima facie case that the plaintiff did not sustain a “serious injury” (*see Toure v Avis Rent A Car Sys.*, *supra*; *Gaddy v Eycler*, 79 NY2d 955, 582 NYS2d 990 [1992]). When a defendant seeking summary judgment based on the lack of serious injury relies on the findings of the defendant’s own witnesses, “those findings must be in admissible form, i.e., affidavits and affirmations, and not unsworn reports” to demonstrate entitlement to judgment as a matter of law (*Pagano v Kingsbury*, 182 AD2d 268, 270, 587 NYS2d 692 [2d Dept 1992]). A defendant also may establish entitlement to summary judgment using the plaintiff’s deposition testimony and medical reports and records prepared by the plaintiff’s own physicians (*see Fragale v Geiger*, 288 AD2d 431, 733 NYS2d 901 [2d Dept 2001]; *Torres v Micheletti*, 208 AD2d 519, 616

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Pagano v Kingsbury, *supra*). Once a defendant meets this burden, the plaintiff must present proof in admissible form which creates a material issue of fact (*see Gaddy v Eycler, supra; Pagano v Kingsbury, supra; see generally, Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

Defendants' submissions establish prima facie that plaintiff did not suffer a serious injury as a result of the subject accident (*see Kurin v Zyuz*, 54 AD3d 902, 864 NYS2d 151 [2d Dept 2008]; *Cartha v Quin*, 50 AD3d 530, 856 NYS2d 581 [1st Dept], *lv denied* 11 NY3d 704, 864 NYS2d 807 [2008]; *Passaretti v Ping Kwok Yung*, 39 AD3d 517, 835 NYS2d 224 [2d Dept 2007]). Plaintiff testified at a 50-h hearing conducted in November 2004 that he was treated at the emergency department of Stony Brook Hospital immediately after the accident for complaints of pain in his neck, right shoulder, and left hand, and that he was released from the hospital that same day without any prescriptions or instructions for follow-up care. He testified that a couple of days after the accident he sought treatment for neck and hand pain from his family physician, Dr. Lunati, who recommended that he treat with a neurologist. He testified that he then sought treatment from Dr. Poole, a neurologist, who performed electrodiagnostic nerve studies. Plaintiff testified that Dr. Poole recommended that plaintiff be seen by a surgeon, as the electrodiagnostic tests revealed ulnar nerve pathology in plaintiff's left elbow. Plaintiff testified that subsequently he sought treatment from Dr. Hausman, who specializes in hand and upper extremity surgery. He testified that although Dr. Hausman recommended that surgery be performed on the left elbow, he decided he "didn't have the time right now" and thought the elbow might improve on its own. Plaintiff further testified that he missed approximately two weeks of work due to the injuries he suffered in the accident, and that, while he still was able to perform the activities he performed before the accident, he was having difficulty with the strength in his left hand. When questioned about the medical treatment he had received to date for the injuries alleged in this action, plaintiff testified that he had been treated three or four times by Dr. Lunati, four or five times by Dr. Poole, and one time by Dr. Hausman.

At a deposition conducted in June 2007, plaintiff testified that, during the approximately 2½ year-period between the 50-h hearing and his deposition, he underwent out-patient surgical procedures to repair a severed tendon in his left hand and to repair a hernia, and that both injuries occurred while he was at work. Moreover, plaintiff testified that on May 25, 2007, Dr. Hausman performed surgery on plaintiff's left elbow to "reroute" the ulnar nerve, and that he was scheduled to have a follow-up appointment with Dr. Hausman the following day. He testified that a tingling sensation that began in his left arm approximately one week after the subject accident had improved since the surgery, but that his grip strength had not improved. He also testified that, while nerve conduction testing and magnetic resonance imaging examinations were performed at Dr. Hausman's direction prior to the surgery on the left elbow, he has not received any physical therapy treatment or other medical care for the alleged injuries to such elbow.

Further, Dr. Reiser's report states, in relevant part, that plaintiff presented at the examination conducted in March 2008 with complaints of weakness and loss of muscle bulk in both hands, particularly the right hand; tingling sensation in the right hand; and difficulty with his left shoulder limiting his ability to abduct his left arm. It discusses in detail the various medical records relating to plaintiff's alleged injuries reviewed in connection with the independent physical examination. The report states, among other things, that plaintiff previously was diagnosed with arthritis at the left elbow; that the initial medical data following the accident did not reveal evidence of acute denervation; that

report states, among other things, that plaintiff previously was diagnosed with arthritis at the left elbow; that the initial medical data following the accident did not reveal evidence of acute denervation; that there was no medical evidence of right ulnar nerve symptomatology until 2006; and that surgery was performed on the ulnar nerve in the left elbow in May 2007 and on the ulnar nerve in the right elbow in September 2007. It states that during the March 2008 examination of plaintiff, Tinel's signs were positive over the ulnar aspects of both of elbows, but negative over the ulnar and median regions of both wrists. It also states that a motor examination conducted at that time revealed marked wasting of the muscles in both hands innervated by the ulnar nerve; that the hands muscles are weak and the ring and pinky fingers do not fully extend; and that fine finger movements are limited in both hands. The report further states that a sensory examination showed "marked reduction of pin and temperature sensation in the ulnar distribution on the right side," but "no deficit to pin and temperature stimulation in the ulnar nerve distribution on the left side."

Dr. Reiser opines that plaintiff had preexisting arthritis at his elbows and that, while the ulnar nerve symptomatology in plaintiff's left elbow first began after the subject accident, "the progression of his ulnar nerve involvement at both elbows between 2004 and 2006" was due to factors not related to the subject accident. He further opines that the 2006 EMG findings of acute ulnar nerve involvement "would not be explained by an injury in 2004," and that plaintiff's progressive ulnar nerve condition was not related to an acute injury. Finally, Dr. Reiser concludes that plaintiff has experienced improvement since the surgeries on his ulnar nerves, particularly in his right extremity, and that his "principal symptoms at the present time are on the right side, which was not injured" in the subject accident.

The burden of proof, therefore, shifted to plaintiff to raise a triable issue of fact (*see Gaddy v Eyler, supra*). A plaintiff claiming injury within the "limitation of use" categories must substantiate his or her complaints of pain with objective medical evidence showing the extent or degree of the limitation of movement caused by the injury and its duration (*see Laruffa v Yui Ming Lau*, 32 AD3d 996, 821 NYS2d 642 [2d Dept 2006]; *Cerisier v Thibiu*, 29 AD3d 507, 815 NYS2d 140 [2d Dept 2006]; *Meyers v Bobower Yeshiva Bnei Zion*, 20 AD3d 456, 797 NYS2d 773 [2d Dept 2005]). He or she must present medical proof contemporaneous with the accident showing the initial restrictions in movement or an explanation for its omission (*see Hackett v AAA Expedited Freight Sys.*, 54 AD3d 721, 865 NYS2d 101 [2d Dept 2008]; *Ferraro v Ridge Car Serv.*, 49 AD3d 498, 854 NYS2d 408 [2d Dept 2008]; *Morales v Daves*, 43 AD3d 1118, 841 NYS2d 793 [2d Dept 2007]; *Bell v Rameau*, 29 AD3d 839, 814 NYS2d 534 [2d Dept 2006]), as well as objective medical findings of restricted movement that are based on a recent examination of the plaintiff (*see Berkowitz v Taylor*, 47 AD3d 740, 851 NYS2d 597 [2d Dept 2008]; *Laruffa v Yui Ming Lau, supra*; *Murray v Hartford*, 23 AD3d 629, 804 NYS2d 416 [2d Dept 2005], *lv denied* 6 NY3d 713, 816 NYS2d 748 [2006]; *Batista v Olivo*, 17 AD3d 494, 795 NYS2d 54 [2d Dept 2005]; *Kauderer v Penta*, 261 AD2d 365, 689 NYS2d 190 [2d Dept 1999]). "Whether a limitation of use or function is 'significant' or 'consequential' * * * relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part" (*Dufel v Green*, 84 NY2d 795, 798, 622 NYS2d 900 [1995]; *see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 746 NYS2d 865 [2002]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*see, Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]). Also, a plaintiff claiming serious injury within

the limitation of use categories who ceases treatment after the accident must provide a reasonable explanation for having done so (*Pommells v Perez*, 4 NY3d 566, 574, 797 NYS2d 380 [2005]; see *Ferebee v Sheika*, 58 AD3d 675, 873 NYS2d 93 [2d Dept 2009]; *Besso v DeMaggio*, 56 AD3d 596, 868 NYS2d 681 [2d Dept 2008]).

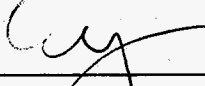
Moreover, when a defendant in an action seeking to recover damages for a serious physical injury presents evidence that a plaintiff's alleged pain and injuries are related to a preexisting condition, the plaintiff must come forward with medical evidence addressing the defense of lack of causation (*Pommells v Perez*, 4 NY3d 566, 580, 797 NYS2d 380 [2005]; see *Luciano v Luchsinger*, 46 AD3d 634, 847 NYS2d 622 [2d Dept 2007]; *Giraldo v Mandanici*, 24 AD3d 419, 805 NYS2d 124 [2d Dept 2005]). If a plaintiff had a preexisting medical condition, he or she must demonstrate that the subject accident aggravated the condition to such an extent that it produced a serious injury within the meaning of Insurance Law §5102 (d) (see *Knoll v Seafood Express*, 5 NY3d 817, 803 NYS2d 25, affg 17 AD3d 233, 793 NYS2d 391 [1st Dept 2005]; *Seck v Minigreen Hacking Corp.*, 53 AD3d 608, 863 NYS2d 218 [2d Dept 2008]; *McNeil v Dixon*, 9 AD3d 481, 780 NYS2d 635 [2d Dept 2004]).

Contrary to the assertions by plaintiff's counsel, the evidence submitted in opposition to the motion is insufficient to defeat summary judgment. Initially, the Court notes that the report of Dr. Cohen, who performed an "independent orthopedic evaluation of plaintiff" on behalf of his no-fault insurance carrier, was not considered in its determination of the motion, as the copy provided does not include Dr. Cohen's signature and, therefore, is not in admissible form (see generally *Gaddy v Eycler*, supra; *Pagano v Kingsbury*, supra). Significantly, none of the sworn medical reports prepared by plaintiff's treating physicians attribute the ulnar nerve neuropathy in his left arm to an injury suffered in the subject accident (see *Garcia v Lopez*, 59 AD3d 593, 872 NYS2d 719 [2d Dept 2009]; *Collins v Stone*, 8 AD3d 321, 778 NYS2d 79 [2d Dept 2004]). In fact, a report by Dr. Hausman, dated September 22, 2004, states that plaintiff suffers from "long standing" elbow arthritis in his left arm, that the newly developed ulnar neuropathy condition "is most likely due to compression within the cubital tunnel," and that such condition "is rather advanced as there is a significant loss of sensation and as well as significant muscle weakness." Another report by Dr. Hausman, dated July 24, 2006, states that new radiographs of the left elbow showed "significant degenerative changes with osteophytes and probable loose bodies and calcifications." Furthermore, plaintiff failed to present any evidence controverting the findings of defendants' expert that plaintiff suffered from a preexisting degenerative condition in his left elbow, and that the ulnar nerve entrapment in the left arm was a progressive condition unrelated to the subject accident (see *Besso v DeMaggio*, supra; *Seck v Minigreen Hacking Corp.*, supra). In addition, neither plaintiff nor plaintiff's treating physicians explained the nearly two-year gap between the time he last sought treatment for his left elbow in September 2004 and his re-examination by Dr. Hausman in July 2006 for complaints of limited movement and pain in the left elbow (see *Pommells v Perez*, supra; *Ponciano v Schaefer*, ___ AD3d ___, 873 NYS2d 212 [2d Dept 2009]; *Besso v DeMaggio*, supra). Finally, plaintiff's affidavit, which alleges that he "never experienced any pain, numbness, tingling or loss of strength in my left hand, arm or elbow at any time prior to this accident," and that, while the numbness and tingling in his left arm has improved since the surgery, he still lacks grip strength, is insufficient to raise a triable issue as to whether plaintiff suffered a significant limitation of use of his left arm and hand due to the subject accident (see *Casas v Montero*, 48 AD3d 728, 853 NYS2d 358 [2d Dept 2008]; *Shvartsman v Vildman*, 47 AD3d 700, 849 NYS2d 600 [2d Dept 2008]). Accordingly,

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defendants' motion for summary judgment dismissing the complaint based on plaintiff's failure to meet the serious injury threshold is granted.

Dated: 4/9/09



J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION