

Garcia v Soto

2010 NY Slip Op 30862(U)

April 8, 2010

Supreme Court, New York County

Docket Number: 107415/2006

Judge: George J. Silver

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

PRESENT: GEORGE J. SILVER
J.S. Justice

PART 22

Index Number : 107415/2006

GARCIA, LYDIA

VS.

SOTO, VICTOR

SEQUENCE NUMBER : 005

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

n this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

NOTICE OF CROSS MOTION

Cross-Motion: Yes

No

FILED
 APR 15 2010
 NEW YORK COUNTY CLERK'S OFFICE

PAPERS NUMBERED

1
 2, 3
 4, 7
 6

Upon the foregoing papers, it is ordered that this motion

In this consolidated action to recover for personal injuries allegedly sustained in a motor vehicle accident defendant Victor Soto (hereinafter defendant) moves pursuant to CPLR § 3212 for summary judgment dismissing the complaints of plaintiffs Lydia Garcia (hereinafter Garcia) and Mohammad Munir (hereinafter Munir) on the ground that plaintiffs did not sustain serious injuries as defined by Insurance Law § 5102 [d]. Munir cross moves pursuant to CPLR § 3212 for an order granting him summary judgment on his claim under the 90/180 day category of Insurance Law § 5102 [d].

Plaintiff Garcia

Plaintiff Garcia alleges in her verified bill of particulars that, as a result of the alleged August 3, 2005 accident she sustained a left scaphoid fracture, carpal tunnel syndrome (Garcia subsequently withdrew her carpal tunnel syndrome) and exacerbation of a pre-existing fracture/dislocation of the right elbow. The verified bill of particulars further alleges that plaintiff sustained the following serious injuries: significant disfigurement; a fracture; 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 prevented her from performing substantially all of the material acts which constituted her 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. The bill of particulars is silent as to whether Garcia was confined to her home and/or bed following the accident.

Dated: _____

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

On a motion for summary judgment, where the issue is whether the plaintiff has sustained a serious injury under the no-fault law, the defendant bears the initial burden of presenting competent evidence that there is no cause of action (*Wadford v. Gruz*, 2006 NY Slip Op 9381 [1st Dept]). “[A] defendant can establish that [a] plaintiff’s injuries are not serious within the meaning of Insurance Law § 5102 (d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff’s claim” (*Grossman v Wright*, 268 AD2d 79, 83-84 [1st Dept 2000]). In order to establish prima facie entitlement to summary judgment under the 90/180 day category of the statute, defendants must provide medical evidence of the absence of injury precluding 90 days of normal activity during the first 180 days following the accident (*Ellas v Mahlah*, 2009 NY Slip Op 43 [1st Dept]). “However, the First Department has previously held that a defendant can establish prima facie entitlement to summary judgment on this category without medical evidence by citing other evidence, such as the plaintiff’s own deposition testimony or records demonstrating that he or she was not prevented from performing all of the substantial activities constituting customary daily activities for the prescribed period” (*id.*). If this initial burden is met, “the burden shifts to the plaintiff to come forward with evidence to overcome the defendant’s submissions by demonstrating a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law” (*Grossman*, 268 AD2d at 84). The plaintiff is required to present nonconclusory expert evidence sufficient to support a finding not only that the alleged injury is serious within the meaning of Insurance Law § 5102(d), but also that the injury was causally related to the accident (*Valentin v Pomilla*, 59 AD3d 184 [1st Dept 2009]).

In support of his motion, defendant properly relies on several unsworn reports from Garcia’s treating orthopedist, Dr. Nelson G. Botwinick (*Torres v. Micheletti*, 208 AD2d 519 [2d Dept 1994]). Dr. Botwinick examined Garcia on August 9, 2005 and noted in his consultation report a pre-existing fracture/dislocation of Garcia’s right elbow. Dr. Botwinick also noted that an x-ray taken of Garcia’s wrist revealed a scaphoid fracture. Garcia saw Dr. Botwinick for a follow-up examination on February 8, 2006 and in his follow up report Dr. Botwinick again noted that Garcia’s right elbow injury was unrelated to the motor vehicle accident. Dr. Botwinick also noted that Garcia’s left scaphoid injury had healed and he discharged her from care with respect to that injury. Defendant also submits an unsworn x-ray report from Bellevue Hospital. The report references x-rays taken on August 3, 2005 of Garcia’s left wrist and indicates that there was no evidence of acute fracture or dislocation but recommends repeat imaging in seven-to-ten days following immobilization if there is strong clinical concern of a scaphoid injury. Further, defendant submits an unsworn report of a CT scan of Garcia’s wrist, taken on August 25, 2005, which states that there is linear hypodensity identified traversing the scaphoid tubercle best visualized on the coronal reformed images which may represent a vascular groove rather than a fracture. The report further states that clinical correlation is suggested and recommended that Garcia have a bone scan if she continued to experience pain. Moreover, defendant submits a follow-up report from Dr. Botwinick dated October 11, 2005 which indicates that Garcia’s scaphoid was clinically and radiographically healed and states that Garcia had no complaints with respect to her wrist and only minimal discomfort. In addition, defendant submits an August 16, 2006 follow-up report from Dr. Botwinick which indicates that Garcia’s left wrist is essentially asymptomatic and that Garcia has no pain, weakness or numbness.

Finally, defendant also submits an affirmed report by Dr. Robert Goldstein, who found that the August 3rd x-rays of Garcia's left wrist taken at Bellevue Hospital, as well as follow-up x-rays taken at Seaport Orthopedic Associates. Dr. Goldstein concluded that these x-rays contained no evidence of acute fracture or dislocation. Dr. Goldstein also discusses the findings contained in Dr. Botwinick's August 9, 2005 report and notes his disagreement with Dr. Botwinick's diagnosis of a left scaphoid fracture. Dr. Goldstein did not make any findings as to Garcia's range of motion in her wrist.

Through Dr. Botwinick's reports, which unambiguously describe Garcia's right elbow injury as preexisting and unrelated to the subject vehicle accident, defendant has established his prima facie entitlement to summary judgment on Garcia's claim that she suffered an exacerbation of her right elbow injury in the subject motor vehicle accident. Defendant has not, however, sustained his prima facie burden with respect to Garcia's claim of a fracture left scaphoid. While Dr. Goldstein found no evidence of fracture or dislocation upon his review of the x-rays of Garcia's left wrist, Dr. Botwinick did. Defendant's submission thus contains conflicting medical evidence from which varying inferences may be drawn and raises a triable issue of fact (*see Martinez v. Pioneer Transp. Corp.*, 2008 NY Slip Op 1441 [1st Dept]). Moreover, the CT scan report and x-ray report from Bellevue Hospital relied upon by defendant are equivocal in that neither one conclusively establishes that there was no fracture of Garcia's left scaphoid. The CT scan report states that the linear hypodensity identified traversing the scaphoid tubercle *may* represent a vascular groove rather than a fracture. Similarly, the Bellevue Hospital x-ray reports recommends repeat imaging after a brief period of immobilization. Therefore, it is not necessary to consider whether plaintiff's opposition with respect to this injury is sufficient to raise a triable issue of fact (*Frias v. James*, 2010 NY Slip Op 301 [1st Dept]). Finally, though a question of fact exists as to whether Garcia sustained a fracture, defendant has established his prima facie entitlement to summary judgment on Garcia's claim under the 90/180 day category of Insurance Law § 5102 [d]. Dr. Botwinick's October 11, 2005 report, dated sixty nine (69) days after the subject accident, indicates that Garcia's wrist injury had healed both clinically and radiographically. Therefore, any claim that Garcia was prevented from performing substantially all the material acts which constituted her usual and customary daily activities as a result of the alleged fracture is not supported by objective evidence of a "medically determined injury or impairment of a non-permanent nature" (*Manon v. Doucoure*, 2009 NY Slip Op 1349 [1st Dept]).

In opposition, Garcia does not offer any medical evidence in support of her claim that she suffered an exacerbation of her right elbow injury. In fact, Dr. Botwinick does not address this alleged injury at all in his affirmation. Nor has Garcia offered the requisite competent medical proof to substantiate her claim under the 90/180 day category (*Santiago v. Bhuiyan*, 2010 NY Slip Op 1890 [1st Dept]). Accordingly, defendant's motion is granted to the extent that Garcia's claim of exacerbation of a pre-existing fracture/dislocation of the right elbow is dismissed, as is Garcia's claim under the 90/180 day category of Insurance Law § 5102 [d].

Plaintiff Munir

Munir's verified bill of particulars alleges that, as a result of the accident, he sustained a scalp laceration with repair; trauma with acute alteration in level of awareness and neck pain; disc bulge at L4-L5 level slightly asymmetric to the left; mild left neural foramina stenosis; disc

bulge at L5-S1 level; right C5-6 cervical radiculopathy; severe myoligamentous injury to the cervical and lumbar spine; acute cervical sprain/strain; right shoulder contusion with signs of post-traumatic internal derangement and/or rotator cuff tear; tendonitis of the right shoulder; tendonitis of the right knee; right knee contusion with signs of internal derangement and/or meniscal tear; post traumatic derangement of the right knee; right knee sprain; head injury with post concussion syndrome; musculoskeletal radicular pain syndrome of the lumbosacral spine; and myoligamentous injury of the cervical spine with discopathy. The bill of particulars further alleges that Munir was totally incapacitated from employment from August 3, 2005 to November 11, 2005. Munir claims that his injuries meet the definition of "serious injury" in Insurance Law § 5102 because he suffered a fracture; 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; and/or a medically determined injury or impairment of a non-permanent nature which prevented him from performing substantially all of the material acts which constituted his 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.

Defendant submits numerous medical reports and records from Munir's May 20, 2004 motor vehicle accident in support of his contention that Munir's injuries are preexisting and unrelated to the subject motor vehicle accident. Defendant argues that the injuries described in these medical records are identical to the injuries Munir now claims. Specifically, defendant offers a June 3, 2004 report by Dr. Boris Tsatskis, plaintiff's treating physician. As a result of plaintiff's May 20, 2004 accident, Dr. Tsatskis found that plaintiff had restricted range of motion in his shoulders, cervical spine, lumbar spine and knees. Dr. Tsatskis's initial impressions were myoligamentous injury to the cervical and lumbosacral spine; acute cervical sprain and strain; musculo-skeletal radicular pain syndrome with lumbar spine; left knee contusion with signs of internal derangement and/or meniscal tear; right knee contusion; left shoulder contusion with signs of bicipital tendonitis; and head injury with post-traumatic cephalgia. Munir was started on an aggressive course of physical therapy and Dr. Tsatskis recommended MRIs of Munir's cervical and lumbar spine and left knee. Additionally, Dr. Tsatskis's electrodiagnostic reports reveal that Munir had L5-S lumbar radiculopathy and C6-C7 cervical nerve root dysfunction while two radiology reports, dated June 11, 2005 and August 20, 2004, respectively, indicate that Munir had a central posterior bulging disc at C5-C6 deforming the thecal sac and a posterior bulging disc at L5-S1 extending into the epidural fat abutting the bilateral S1 nerve roots. Defendant also submits a report of Munir's treating chiropractor, Dr. Arthur L. Schoenfeld, who in an undated report found that as a result of the May 20, 2004 accident, Munir sustained extremes of joint movement with concomitant over-stretching and tearing of the cervical, thoracic and lumbar spines. Dr. Schoenfeld concluded that Munir may have suffered permanent weakening in the region and that he would be subject to frequent exacerbations of his symptom complex.

In addition to the medical records pertaining to Munir's prior accident, defendant also offers an affirmed report by Dr. Goldstein, who performed an orthopedic examination of Munir on March 10, 2009. Measuring Munir's range of motion visually, Dr. Goldstein found that Munir had normal range of motion in his cervical spine, his lumbar spine, his shoulders, elbows,

wrists, fingers, hips, knees and ankles. Dr. Goldstein concluded that there were no objective orthopedic findings in Munir's cervical spine, shoulders/upper extremities, lumbosacral spine or his knees/lower extremities. Dr. Goldstein diagnosed Munir as having no orthopedic disability or permanency referable to the August 3, 2005 accident. Defendant also offers an affirmed report by Dr. Lewis Rothman, who reviewed the March 11, 2006 MRI of Munir's lumbar spine and found evidence of minimal chronic degenerative disc manifest by mild disc desiccation throughout the lumbar region and minimal disc bulges at L4/5 and L5/S1. Dr. Rothman found no evidence of disc herniation or other acute posttraumatic abnormality.

Despite the fact that Dr. Goldstein's report fails to set forth the objective tests he utilized to determine that Munir had normal range of motion, as a visual range of motion measurement is subjective, and that fact that Dr. Rothman's report only addresses Munir's alleged lumbar injuries, defendant has nevertheless established, through Munir's own medical records, that Munir was involved in a prior motor vehicle in which he sustained injuries virtually identical to the those alleged in this action (*see Moses v Gelco*, 2009 NY Slip Op 4980 [1st Dept]). It is now incumbent on Munir to present proof to meet defendant's asserted lack of causation (*Brewster v FTM Servo, Corp.*, 44 AD3d 351 [1st Dept 2004]; *Sky v Tabs*, 2008 NY Slip Op 9475 [1st Dept]).

In opposition, Munir offers an affirmation by Dr. Tsatskis. Dr. Tsatskis avers that the injuries he treated relating to the May 20, 2004 accident were to Munir's left knee and lumbar spine, specifically a bulging disc at L5-S1. Dr. Tsatski also treated Munir for left C6-C7 cervical nerve root dysfunction and left sided L5-S1 lumbar radiculopathy. Nerve block injections used to treat the injuries arising out of the May 20, 2004 accident resolved Munir's pain and range of motion issues. The last date Dr. Tsatski treated Munir for the May 20, 2004 accident was September 23, 2004, when Munir made a complete recovery from his injuries and no further treatment was warranted. Dr. Tsatskis claims that as a result of the August 3, 2005 accident, he treated Munir for right C5-C6 radiculopathy and lumbar injury at the L4-5 level. Dr. Tsatski also avers that Munir sustained severe permanent injuries to his right knee and right shoulder in the August 3, 2005 accident, as well as injuries to his neck and back. Dr. Tsatski claims that he advised Munir to avoid any strenuous physical activity, including work, for three months and to rest at home for the majority of that time. At his initial examination of Munir on August 10, 2005, Dr. Tsatski also found that Munir had decreased range of motion in his right shoulder, cervical spine, lumbar spine and right knee. Dr. Tsatskis's opinion is that the injuries and multi-level deficits sustained by Munir prevented him from performing duties as a taxi driver for more than ninety (90) consecutive days post accident.

Munir also submits an affidavit in which he avers that on before the August 3, 2005 accident date he was a self-employed taxi driver associated with All Taxi Management. Munir further avers that following the accident he was confined to his bed and home for three months and one week and only returned to work in November 2005. Munir claims that since returning to work he has been unable to work the fifty-to-sixty hours he worked prior to the accident.

Assuming that Dr. Tsatski's affirmation establishes that the injuries allegedly sustained by Munir in the subject motor vehicle accident are distinct from the injuries he sustained in a prior accident, in order to raise a triable issue of fact, Munir's claim that his range of motion is limited must be sustained by objective medical findings that are "based on a recent examination of the plaintiff" (*Grossman v Wright*, 268 AD2d 79, 84, 707 NYS2d 233 [2000]). Since Munir's

alleged range of motion restrictions are based upon a 2005 examination by Dr. Tsatski, Munir's claims under permanent consequential limitation of use of a body organ or member and significant limitation of use of a body function or system categories of Insurance Law § 5102 [d] must be dismissed. Also, Dr. Tsatski's affirmation does not indicate that Munir has sustained a total loss of use, which is necessary to establish a permanent loss of use of a body organ, member, function or system (*Byong Yol Yi v. Canela*, 2010 NY Slip Op 1580 [1st Dept]). Dismissal of Munir's claims under the permanent loss of use of a body organ, member, function or system, permanent consequential limitation of use of a body organ or member and significant limitation of use of a body function or system categories is also warranted because of Munir's unexplained cessation of treatment in 2005, raised by defendant in his moving papers. In response, Munir argues only that the gap in treatment doctrine does not apply to his 90/180 day claim. There has also been no showing that Munir sustained a fracture as a result of the subject accident.

With respect to Munir's claim under the 90/180 days category of Insurance Law § 5102 [d], the fact that Munir may have missed more than ninety days of work is not determinative of this claim (*Amamedi v Archibala*, 2010 NY Slip Op 901 [1st Dept]) and there is no evidence in the record to establish that Munir was prevented from performing substantially all of the material acts that constituted his usual and customary daily activities for 90 days during the 180 days following the accident (*Fernandez v Niamou*, 2009 NY Slip Op 6595 [1st Dept]). Therefore, Munir's 90/180 day claim is dismissed and his cross-motion for summary judgment on this category in denied. Accordingly, it is hereby

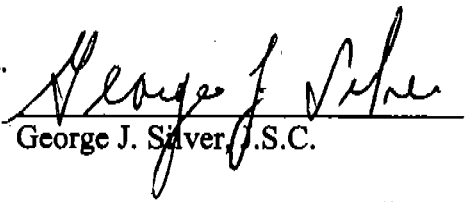
ORDERED that defendant's motion for summary judgment is granted to the following extent: (1) Plaintiff Lydia Garcia's claim of exacerbation of a pre-existing fracture/dislocation of the right elbow and her claim under the 90/180 day category of Insurance Law § 5102 [d] are dismissed; (2) Plaintiff Mohammad Munir's complaint is dismissed in its entirety with costs and disbursements to defendant as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that plaintiff Mohammad Munir's cross-motion for summary judgment is denied; and it is further

ORDERED that defendant is to serve a copy of this order with notice of entry upon all parties within thirty days.

This constitutes the decision and order of the Court.


George J. Silver, J.S.C.

GEORGE J. SILVER
J.S.C.

Dated: April 8, 2010
New York County

FILED

APR 15 2010

Index No. 107415-2006

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