

Penney v Gates

2010 NY Slip Op 31022(U)

April 28, 2010

Supreme Court, Greene County

Docket Number: 08/1446

Judge: Joseph C. Teresi

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK
SUPREME COURT
RICHARD PENNEY,

COUNTY OF GREENE

Plaintiff,

-against-

DECISION and ORDER
INDEX NO. 08-1446
RJI NO. 19-08-3993

ARTHUR GATES and LOUISE HUGHES,

Defendants.

Supreme Court Greene County All Purpose Term, April 6, 2010
Assigned to Justice Joseph C. Teresi

APPEARANCES:

Jeff Brody Injury Law
Jeff Brody, Esq.
Attorneys for Plaintiff
236 Clinton Avenue
PO Box 4116
Kingston, New York 12402

Hite & Beaumont, PC
John Beaumont, Esq.
Attorneys for Defendant Arthur Gates
20 Corporate Woods Boulevard
2nd Floor
Albany, New York 12211

Boeggeman, George & Corde, PC
Paul A. Hurley, Esq.
Attorneys for Defendant Louise Hughes
39 North Pearl Street, Suite 501
Albany, New York 12207

TERESI, J.:

On September 10, 2007, Richard Penney (hereinafter "Plaintiff") was driving in the Town of Cairo, New York, when his vehicle was struck by a vehicle driven by Arthur Gates and owned

by Louise Huges.¹ Plaintiff commenced this action, seeking to recover for his claimed injuries. Issue was joined by Defendants, discovery is complete and a trial date certain is set. Defendants now move for summary judgment claiming that Plaintiff suffered no causally related “serious injury” as required by New York’s No Fault Law. (Insurance Law §5102[d]). Plaintiff opposes the motion, and cross-moves for an Order authorizing a proposed late expert discovery response. Defendants oppose Plaintiff’s motion. Because Defendants failed to demonstrate their entitlement to judgment as a matter of law, their motion is denied. Similarly, because Plaintiff failed to demonstrate his entitlement to the Order he seeks, his motion is also denied.

It is well established that the “legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries.” (Toure v. Avis Rent A Car Systems, Inc., 98 NY2d 345, 350 [2002]). However, “[s]ummary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue.” (Napierski v. Finn, 229 AD2d 869, 870 [3d Dept. 1996]).

On this motion for summary judgment “the defendant bears the initial burden of establishing by competent medical evidence that plaintiff did not sustain a serious injury caused by the accident.” (Howard v. Espinosa, 70 AD3d 1091, __ [3d Dept. 2010], quoting Haddadnia v. Saville, 29 AD3d 1211 [3d Dept. 2006]; Wolff v. Schweitzer, 56 AD3d 859, 860 [3d Dept. 2008]; Pommells v. Perez, 4 NY3d 566 [2005]; Franchini v. Palmieri, 1 NY3d 536 [2003]). And, the evidence must be viewed “in a light most favorable to plaintiffs.” (Hildenbrand v. Chin, 52 AD3d 1164, 1166 [3d Dept. 2008]).

¹ Arthur Gates and Louise Huges will hereinafter be referred to collectively as Defendants.

If the movants establish their right to judgment as a matter of law, the burden then shifts to the plaintiff to “set forth competent medical evidence based upon objective medical findings and tests to support his claim of serious injury and to connect the condition to the accident.” (Wolff, supra 861 quoting Blanchard v. Wilcox, 283 AD2d 821 [3d Dept. 2001]; Nowak v. Breen, 55 AD3d 1186, 1187 [3d Dept. 2008]).

The “serious injury” at issue in this action is defined by Plaintiff’s Bill of Particulars. (Lee v. Laird, 66 AD3d 1302, 1303 [3d Dept. 2009], Seymour v. Roe, 301 AD2d 991 [3d Dept. 2003], MacDonald v Meierhoffer, 13 AD3d 689 [3d Dept. 2004]). In his bill of particulars Plaintiff alleges suffering injuries that constitute a “permanent loss of use” injury, a “significant limitation of use” injury and a 90/180 day injury. (Insurance Law §5102[d]).

In support of their motion, Defendants offer their own expert’s opinion, which is based upon his review of Plaintiff’s medical records and a physical examination of Plaintiff. Defendants also properly introduced Plaintiff’s medical records. (Parks v. Miclette, 41 AD3d 1107 [3d Dept. 2007]; Tuna v. Babendererde, 32 AD3d 574, 575 [3d Dept. 2006]; Seymour v. Roe, 301 AD2d 991 [3d Dept. 2003]). Such submissions, however, fail to properly demonstrate Defendants’ entitlement to judgment as a matter of law.

Plaintiff’s medical records contain reports from an MRI of his lumbar spine, taken within two weeks of the accident, and an MRI of his cervical spine, taken within eight weeks of the accident. The lumbar spine MRI report found “[a]t L5-S1... a focal disk protrusion to the left which abuts the S1 nerve root... and some degenerative facet disease... at L3-4, L4-5 and to a lesser degree L5-S1.” Additionally, the cervical spine MRI report noted “mild bulging of the disks” at C5-6, and C6-7, “posterior central protrusion of” C4-5 and that “the neural foramina are

mildly narrowed.” Defendants’ expert also examined both MRIs, resulting in substantially similar findings. From such findings the Defendants’ expert concludes, in both his affidavit and report, that the MRIs revealed degenerative changes not caused by a traumatic event. However, Defendants’ expert fails explain the underlying medical facts for such conclusion or his reasoning, causing the conclusion to be only moderately probative. Moreover, Defendants’ expert’s opinion that disassociates the Plaintiff’s symptoms from the MRI’s findings is wholly unexplained. Such unsupported conclusory opinions are especially unpersuasive considering the Plaintiff’s failure to present any evidence that any of Plaintiff’s current symptoms were present prior to the accident.

Moreover, Defendants’ expert failed to address and resolve all of the potentially objective manifestations of Plaintiff’s injuries noted in his medical records. Defendants’ attached the records Doctor Khan created following his examination of Plaintiff. As noted by Defendants’ expert, Doctor Khan’s examination found that Plaintiff’s “[l]umbar spine flexion was 60 degrees”. Although Defendants’ expert does not quantify or explain such finding, Doctor Khan’s notes indicate that the 60° finding is a “limitation.” Similarly, while Defendants’ expert acknowledged Dr. Gamburg’s finding that Plaintiff’s “[l]umbar extension was 15 degrees [and] Left straight leg raising was 40 degrees”, he does not analyze or explain the significance of such finding. Rather, reviewing Dr. Gamburg’s records, such findings denote limitations on Plaintiff’s range of motion. Defendants’ expert also specifically recognized Plaintiff’s physical therapist’s limited range of motion finding, but again failed to explain how such finding was not causally related to the accident, why it was insignificant or how it was not an objective manifestation of Plaintiff’s injury. Defendants’ expert also failed to account for Doctor

Safarov's "mildly decreased ROM [range of motion] of C spine and moderately decreased ROM examination of LS spine" findings, although he acknowledged reviewing Doctor Safarov's report. Moreover, Defendants' expert did not acknowledge reviewing Dr. Fetell's report, despite its inclusion in Defendants' motion papers, which again notes range of motion limitations in Plaintiff's cervical and lumbosacral spine. Nor did Defendants' expert review, analyze or explain Plaintiff's "Diagnostic fluoroscopy of the cervical spine" which found that "with extension, there is slight retrolisthesis of C3 on C4, C4 on C5, and C5 on C6, which corrects on flexion compatible with multilevel ligamentous laxity."

Since Plaintiff may establish his "permanent consequential limitation [injury with]... objective, quantitative evidence with respect to diminished range of motion..." (Dean v. Brown, 67 AD3d 1097, 1098 [3d Dept. 2009] quoting John v. Engel, 2 AD3d 1027 [3d Dept. 2003], Lee v. Laird, 66 AD3d 1302 [3d Dept. 2009]) and Defendants did not sufficiently address and refute such evidence contained in Plaintiff's medical record, they failed to demonstrate their entitlement to judgment as a matter of law.

Additionally, due to the foregoing, Defendants' remaining contentions that Plaintiff has not suffered a "serious injury" are irrelevant. "Once a serious injury is established, plaintiff is entitled to recover any damages proximately caused by the accident." (Moffitt v. Murray, 2 AD3d 1110 [3d Dept. 2003] quoting Cerniglia v. Wisniewski, 267 AD2d 660 [3d Dept. 1999]). Because Defendants failed to demonstrate that Plaintiff suffered no "serious injury" as a matter of law, Plaintiff may offer proof at trial of all of his proximately caused injuries. (Moffitt, supra). As such, Defendants' arguments that Plaintiff suffered no "permanent loss of use" injury or a 90/180 day injury are irrelevant. (Linton v. Nawaz, __ NE2d __ [2010]; Kelley v. Balasco, 226

AD2d 880 [3d Dept. 1996]; Bonner v. Hill, 302 AD2d 544 [2d Dept. 2003][stating that “[b]y establishing that any one of several injuries sustained in an accident is a serious injury within the meaning of Insurance Law §5102(d), a plaintiff is entitled to seek recovery for all injuries incurred as a result of the accident.”)].

Turning to Plaintiff’s cross-motion, he failed to demonstrate his entitlement to an Order permitting his proposed late expert discovery response. Both this Court’s Preliminary Conference Stipulation and Order ¶13 and the Third Judicial District’s Expert Disclosure Rule (Doc. 9) require parties to serve their “response to an expert demand... on or before the filing of the note of issue.” On this record, it is uncontested that Plaintiff failed to comply with such requirements for its proposed economic expert witness. Nor has Plaintiff demonstrated compliance with this Court’s Preliminary Conference Stipulation and Order ¶11 by conferencing this “discovery dispute before filing [the instant] discovery motion.” Plaintiff further failed to comply with 22 NYCRR 202.7(a)(2)’s requirement that all discovery motions be supported by an “affirmation that counsel has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion.” Such failure alone requires summary denial of this motion. (Koelbl v. Harvey, 176 AD2d 1040 [3d Dept. 1991]; Diel v. Rosenfeld, 12 A.D.3d 558, 559 [2d Dept. 2004]). Moreover, Plaintiff’s proffered reason for non disclosure is also unavailing. Plaintiff excuses his untimely disclosure by claiming that he had not received a medical report indicating that his injuries were permanent, prior to his filing the note of issue. Such allegation is not, however, further supported by an allegation of any impediment to his obtaining such report prior to the note of issue filing. As such, Plaintiff failed to offer a sufficient excuse or “good cause for [his] delay.” (Douglass v. St. Joseph's Hosp., 246 AD2d

695, 698 [3d Dept. 1998]; Silverberg v. Community General Hosp. of Sullivan County, 290 AD2d 788 [3d Dept. 2002]).

Accordingly, both Plaintiff's and Defendants' motions are denied.

This Decision and Order is being returned to the attorneys for the Plaintiff. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Greene County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: April 28, 2010
Albany, New York


JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated February 25, 2010; Affidavit of John Beaumont, dated February 25, 2010, with attached Exhibits A-R; Affirmation of Christopher Calder, dated February 24, 2010, with attached Exhibits A-B.
2. Notice of Cross-Motion, dated March 3, 2010, Affirmation of Paul Hurley, dated March 3, 2010, with attached Exhibits A - C.
3. Notice of Cross-Motion, dated March 30, 2010, Affirmation of Jeff Brody, dated March 30, 2010, Affidavit of Richard Penney, dated March 26, 2010, with attached Exhibits A-I.
4. Reply Affirmation of Paul Hurley, dated April 5, 2010, with attached Exhibits A-B.
5. Reply Affidavit of John Beaumont, dated April 6, 2010.