

Rubolino v Chisesi

2011 NY Slip Op 33004(U)

November 9, 2011

Supreme Court, Suffolk County

Docket Number: 8542/2009

Judge: William B. Rebolini

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Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Francis G. Rubolino and Frances Rubolino,

Plaintiffs,

-against-

Nicolo Chisesi,

Defendant.

Motion Sequence No.: 001; MD

Motion Date: 4/5/11

Submitted: 8/17/11

Index No.: 08542/2009

Attorney for Plaintiff:

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Attorney for Defendants:

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Clerk of the Court

Upon the following papers numbered 1 to 19 read upon this motion for summary judgment: Notice of Motion and supporting papers, 1 - 11; Answering Affidavits and supporting papers, 12 - 17; Replying Affidavits and supporting papers, 18 - 19.

In this action, the plaintiffs seek to recover damages for personal injuries sustained by plaintiff Francis G. Rubolino (hereinafter the injured plaintiff), and derivatively by his wife plaintiff Frances Rubolino, in a motor vehicle accident which occurred on December 23, 2007. The accident purportedly occurred when the vehicle owned and operated by the defendant collided with the injured plaintiff's vehicle. The plaintiffs alleged that the injured plaintiff sustained serious and permanent injuries as a result of the defendant's negligence in causing the accident. Specifically,

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by way of the bill of particulars, they allege that he sustained serious and permanent injuries including concussion/post-concussion syndrome; memory loss; exacerbation of underlying degenerative disease of the cervical spine; left cervical radiculopathy; bilateral carpal tunnel syndrome; torn medial meniscus of the left knee; rotator cuff tear of the left shoulder with arthritis; arthritis and fluid in the glenohumeral joint of the left shoulder; disc hydration loss C3/4 through C6/7 with diminished disc space height, anterior disc extension, anterior spurring with posterior disc herniation, and with posterior osseous ridging; central canal stenosis; C3/4 facet hypertrophic change and narrowing of the left greater than right foramina; C4/5 ventral cord impression with facet hypertrophic change and narrowing of the right greater than left foramina; C5/6 and C6/7 foraminal narrowing; C7/T1 posterior central and left sided disc bulge; T2/3 posterior right and left peripheral disc herniation with foraminal narrowing; T4 vertebral 1 cm focus compatible with hemangioma; hypertrophic change in the acromioclavicular joint with adjacent osseous edema; supraspinatus tendinosis/tendinopathy with tear of the left shoulder; subscapularis tendinosis/tendinopathy of the left shoulder; peripheral horizontal tears posterior horn and body of the medial meniscus of the left knee and synovial effusion and marrow edema of the left knee. Following the accident, the injured plaintiff missed three days from work and was confined to bed and home for several weeks. The injured plaintiff's daily activities and bodily functions are alleged to be significantly restricted to date.

The defendant now moves for summary judgment dismissing the complaint on the grounds that the injured plaintiff did not sustain a serious injury as defined by Insurance Law §5102 (d).

A "serious injury" is defined 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 constitutes 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" (Insurance Law §5102[d]). The Court of Appeals has held that the issue of whether a claimed injury falls within the statutory definition of a "serious injury" is a question of law for the courts in the first instance, which may properly be decided on a motion for summary judgment (see Licari v. Elliott, 57 NY2d 230 [1982]; Charley v. Goss, 54 AD3d 569 [1st Dept., 2008] *affd* 12 NY3d 750 [2009]).

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (see, Alvarez v. Prospect Hosp., 68 NY2d 320 [1986]; Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851 [1985]; Zuckerman v. City of New York, 49 NY2d 557 [1980]). In a motor vehicle case, a defendant moving for summary judgment on the issue of whether the plaintiff sustained a serious injury has the initial burden of presenting competent evidence establishing that the injuries do not meet the threshold (see, Pagano v. Kingsbury, 182 AD2d 268 [2nd Dept., 1992]). A defendant may satisfy this burden by submitting the affidavits or affirmations

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of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim (see, Grossman v. Wright, 268 AD2d 79 [2nd Dept., 2000]). Once this showing has been made the burden shifts to the plaintiff to produce evidentiary proof in admissible form sufficient 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 (see, Gaddy v. Eyler, 79 NY2d 955 [1992]; Grossman v. Wright, 268 AD2d 79 [2nd Dept., 2000]; Pagano v. Kingsbury, 182 AD2d 268 [2nd Dept., 1992]; see also, Alvarez v. Prospect Hosp., 68 NY2d 320 [1986]; Zuckerman v. City of New York, 49 NY2d 557 [1980]).

In support of their motion for summary judgment, the defendant submits, *inter alia*, the affirmed report of Marc Chernoff, M.D., the affirmed report of S. Murthy Vishnubhakat, M.D., an MRI of the injured plaintiff's cervical spine, the affirmed reports of Scott S. Coyne, M.D. and the injured plaintiff's deposition testimony. This evidence fails to demonstrate the defendant's *prima facie* entitlement to summary judgment on the grounds that the injured plaintiff did not sustain a "serious" injury as a result of the subject accident (see, Toure v. Avis Rent a Car Sys, 98 NY2d 345 [2002]; Gaddy v. Eyler, 79 NY2d 955 [1992]; Liautaud v. Joseph, 59 AD3d 394 [2nd Dept., 2009]).

In this regard, the evidence presented fails to establish, as a matter of law, that the injured plaintiff did not sustain a permanent consequential or significant limitation of use of his cervical spine as a result of the subject accident. Indeed, on recent examinations of the plaintiff the defendant's own experts, Dr. Chernoff and Dr. Vishnubhakat, each found limitations in the injured plaintiff's cervical spine range of motion (see, Kim v. Orourke, 70 AD3d 995 [2nd Dept., 2010]; Landman v. Sarcona, 63 AD3d 690 [2nd Dept., 2009]; Powell v. Prego, 59 AD3d 417 [2nd Dept., 2009]; compare, Tai Ho Kang v. Young Sun Cho, 74 AD3d 1328 [2nd Dept., 2010]; see also, Gaccione v. Krebs, 53 AD3d 524 [2nd Dept., 2008]). Although alleging that the injured plaintiff's cervical spine injury is a pre-existing and chronic condition, the defendant presents no evidence to rebut the injured plaintiff's allegation, in his bill of particulars, that the subject accident aggravated and exacerbated the preexisting condition of his cervical spine. Indeed, neither of the defense experts even addresses this allegation (see, Rabinowitz v. Kahl, 78 AD3d 678 [2nd Dept., 2010]; Washington v. Asdotel Enters., Inc., 66 AD3d 880 [2nd Dept., 2009]; Gentile v. Snook, 20 AD3d 389 [2nd Dept., 2005]; cf., McNeil v. New York City Transit Auth., 60 AD3d 1018 [2nd Dept., 2009]).

The evidence submitted is also insufficient to establish that the injured plaintiff did not sustain a serious injury to his thoracic spine as a result of the subject accident. In fact, the evidence submitted does not address the injured plaintiff's allegation, clearly set forth in his bill of particulars, that he sustained a serious and permanent injury to his thoracic spine (see, Menezes v. Khan, 67 AD3d 654 [2nd Dept., 2009]; McFadden v. Barry, 63 AD3d 1120 [2nd Dept., 2009]; Joseph v. Hampton, 48 AD3d 638 [2nd Dept., 2008]; Staubitz v. Yaser, 41 AD3d 698 [2nd Dept., 2007]; see also, Fenstamacher v. Reyell, 152 AD2d 890 [3rd Dept., 1989]). In this regard, Dr. Chernoff and Dr. Vishnubhakat both fail to provide any range of motion findings, or other objective testing, with respect to the injured plaintiff's thoracic spine (see, Chiara v. Dernago, 70 AD3d 746 [2nd Dept., 2010]; Mannix v. Lisi's Towing Serv., Inc., 67 AD3d 977 [2nd Dept., 2009]; see also, Liautaud v. Joseph, 59 AD3d 394 [2nd Dept., 2009]).

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In addition, the evidence submitted fails to establish, as a matter of law, that the injured plaintiff did not sustain bilateral carpal tunnel syndrome and/or numbness in his left shoulder and arm as a result of the subject accident. Upon performing objective testing on the injured plaintiff, Dr. Chernoff obtained positive results for the Tinel's sign bilaterally and a mildly positive result on the left for the Phalen's sign. Based on his examination, Dr. Chernoff noted that the injured plaintiff had signs and symptoms of carpal tunnel syndrome and deferred comment on causation. Upon examining the injured plaintiff, Dr. Vishnubhakat noted a decreased pin sensation in the plaintiff's right hand and forearm as well as in his left shoulder area. Although Dr. Vishnubhakat states that the type of carpal tunnel noted in the injured plaintiff was unrelated to the subject accident, he fails to offer sufficient foundation to substantiate this conclusion.

In a similar vein, the injured plaintiff's deposition testimony fails to support the defendant's conclusion that he did not sustain a serious injury as a result of the subject accident. As is relevant to this motion, the injured plaintiff testified that the impact at the time of the subject accident was heavy, caused his vehicle to spin and caused his dog, who was in the back seat, to be thrown through the window and out of the vehicle. The last thing the injured plaintiff recalled prior to the accident was approaching an intersection with a green light in his favor. Following the accident, the injured plaintiff was taken to the emergency room by ambulance. He did not recall the treatment that he received at the hospital. As a result of the accident, the injured plaintiff could not turn his head, had a loss in memory, had a concussion, had pain in his shoulder, neck and knee, walked with a limp on the left side and could not lift any weight with his arm. After being released from the hospital, the injured plaintiff next received treatment from an orthopedic physician, Dr. Marzak. He complained to Dr. Marzak about pain in his shoulder, neck and knee and an inability to move. Dr. Marzak told him that tests depicted that he had a torn rotator cuff. He treated with Dr. Marzak on more than six occasions. The injured plaintiff, thereafter, went to physical therapy two or three times a week for approximately two months. He obtained a 25% improvement for approximately two months from physical therapy. However, after approximately three months after stopping physical therapy his pain got worse again. He began treating with the physical therapist again and treated for approximately one month up until the time that he lost medical coverage. The injured plaintiff also treated with Dr. Shannon at Long Island Medical Associates on three or four occasions, complaining of numbness down his neck and arms. After performing testing, Dr. Shannon informed him that nerve damage was causing the numbness. Dr. Shannon informed the injured plaintiff that he may require neck surgery to relieve his pain. Following the subject accident, the injured plaintiff also treated with Dr. Palumbo, a neurologist. Dr. Palumbo prescribed muscle relaxants. At the time of the deposition, the injured plaintiff had an appointment scheduled with Dr. Palumbo which was approximately one month away.

The injured plaintiff was employed as a truck driver at the time of the accident, with duties including delivering materials to construction sites. He returned to work approximately four or five days after the subject accident, but no longer performed any lifting. He retired from his job in October of 2009. He testified that he was confined to his bed for four or five days following the accident but that he did not recall being confined to his home for any period of time. The injured plaintiff testified that his neck pain had reduced following the subject accident but that the numbness

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in his arms had gotten worse. He testified that he currently has pain as a result of the subject accident including pain in his neck, shoulder and knee. His biggest complaints were difficulty sleeping and numbness in his arms and shoulders. Prior to the subject accident, he never experienced any numbness in his arms. According to the injured plaintiff, he currently must go to the gym four or five times a month to do physical therapy exercises so that his body is able to function properly. His physicians have recommended that he undergo surgery. As a result of the injuries he sustained in the accident, he can no longer take long walks and ride his motorcycle further than four miles.

The injured plaintiff admitted that as a result of a prior accident, approximately five or six years prior, he treated with Dr. Palumbo and Dr. Marzak. At that time, he injured his right shoulder and had required right hip replacement surgery. The injured plaintiff did not recall whether he sustained an injury to his neck as a result of the prior accident. He testified that he did not sustain an injury to his left knee or shoulder. According to the injured plaintiff, he had not received treatment for the injuries he sustained in the prior accident for many years prior to the subject accident. The injured plaintiff also admitted that he was involved in a motorcycle accident in August of 2009. However, he testified that he did not reinjure any portion of his body that he injured in the subject accident.

Inasmuch as the evidence submitted by the defendant failed to establish a *prima facie* entitlement to judgment as a matter of law, it is unnecessary to consider whether plaintiffs' opposition papers were sufficient to raise a triable issue of fact (see, Nembhard v. Delatorre, 16 AD3d 390 [2nd Dept., 2005]; McDowall v. Abreu, 11 AD3d 590 [2nd Dept., 2004]; Coscia v. 938 Trading Corp., 283 AD2d 538 [2nd Dept., 2001]).

Based on the foregoing, it is

ORDERED that the motion by the defendant for summary judgment dismissing the complaint is denied.

Dated: NOV 09 2011


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

_____ FINAL DISPOSITION ___X___ NON-FINAL DISPOSITION