

Phillip v Gone Transp. Corp.
2011 NY Slip Op 34130(U)
May 23, 2011
Supreme Court, Bronx County
Docket Number: 307443/09
Judge: Mark Friedlander
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

[*1]

JUN 2 2011

PART 25

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:Case Disposed
Settle Order
Schedule Appearance

PHILLIP, DAIN C.

Index No. 0307443/2009

-against-

Hon. MARK FRIEDLANDER

GONE TRANSPORTATION

Justice.

The following papers numbered 1 to 5 Read on this motion, SUMMARY JUDGMENT DEFENDANT
Noticed on January 26 2011 and duly submitted as No. _____ on the Motion Calendar of 2/25/2011

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1-2	
Answering Affidavit and Exhibits	3, 4	
Replying Affidavit and Exhibits	5	
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this

**MOTION IS DECIDED IN ACCORDANCE WITH
MEMORANDUM DECISION FILED HEREWITH.**

Motion is Respectfully Referred to:

Justice: _____

Dated: _____

Dated: 5 / 23 / 11Hon. 

MARK FRIEDLANDER, J.S.C.

NEW YORK SUPREME COURT - COUNTY OF BRONX
PART IA-25

DAIN C. PHILLIP,

Plaintiff,

MEMORANDUM DECISION/ORDER

Index No.: 307443/09

-against-

GONE TRANSPORTATION CORP., MOHAMED
BAH, HAWRI NUNEZ, YAHANIRA NUNEZ,
GILBERT F. MARTIN and CHRISTINE VICTORIA
PERKINS,

Defendants.

HON. MARK FRIEDLANDER

Defendants, Gone Transportation Corp. and Mohamed Bah (collectively "Gone"), move for an order, pursuant to CPLR§3212, granting them summary judgment dismissing plaintiff's complaint on the ground that plaintiff cannot meet the serious injury threshold requirement mandated by Insurance Law Section 5104(a). Co-defendants, Hawri Nunez and Yahanira Nunez (collectively "Nunez"), also move for summary judgment dismissing plaintiff's complaint against them on the same ground. The motions are consolidated for disposition. Both motions are granted and plaintiff's complaint against defendants Gone and Nunez, only, are dismissed

This action arises out of a motor vehicle accident that occurred on April 24, 2007. Plaintiff was allegedly injured in a three car motor vehicle accident with motor vehicles owned and/or operated by defendants.

Plaintiff claims in his bill of particulars, dated February 22, 2010 (Exhibit B), that, as a result of this accident, he suffered the following:

Severe neck and back pain;
Neck pain radiating to both shoulders;
Headaches;
Right paracentral herniated pulposus at C3-4;
Tenderness to cervical paraspinals;
Limited motion of cervical spine;
Tenderness to lumbosacral paraspinals with trigger points;
Limited motion to lumbar spine;
Myofascitis;
Inability to bend, stand and sit;
Chronic back pain and neck pain;
Tingling and numbness in right thigh;
Low back pain;
Cervical sprain;
Lumbar sprain;
Trigger points over cervical paraspinals;
Cervical lumbosacral radiculopathy;
Myofascial pain syndrome;
Cervical and lumbar derangement, with resultant emotional stress;
Acute mental anxiety;
Inability to perform everyday functions;
Loss of normal pursuits and pleasures of life.

The burden rests on defendants to establish by evidentiary proof, in admissible form, that plaintiff has not suffered a serious injury (*Lowe v. Bennet*, 122 AD2d 728 [1st Dept. 1986], aff'd 69 NY2d 701 [701]). When defendants' evidence is sufficient to make out a *prima facie* case that a serious injury has not been sustained, the burden shifts, and it is then incumbent upon plaintiff to produce sufficient evidence in admissible form to raise a triable issue of fact as to whether plaintiff sustained a serious injury (see *Licari v. Elliot*, 57 NY2d 230 [1982]).

Defendants submit an affirmation from A. Robert Tantleff, M.D., a radiologist, who, on September 24, 2010, reviewed the MRI of plaintiff's cervical spine, taken on May 28, 2010 (Exhibit C); an affirmation from Maria Audrie De Jesus, M.D., a neurologist, who examined plaintiff at defendants' request on October 4, 2010 (Exhibit D); and a copy of the transcript of the

plaintiff's deposition testimony taken on June 20, 2010 (Exhibit E).

Dr. Tantleff, regarding the cervical spine, found advanced discogenic changes of the cervical spine at C3-4 with an osteodiscal complex in the right parasagittal aspect of the disc contributing to unciniate hypertrophy and degenerative spondylosis with associated facet arthropathy resulting in degenerative neuroforaminal stenosis. There was approachment to the ventral aspect of the right cervical cord without compression of the cervical cord with advanced underlying discogenic changes. Dr. Tantleff stated that there was no evidence of acute or recent injury; that the findings depicted required years and decades to develop; are unrelated to the date of incident, and are consistent with the plaintiff's age.

Dr. De Jesus, after examining plaintiff, found that he had normal ranges of motion of the cervical and lumbar spine, with Soto-Hall, cervical distraction, Spurling's, cervical depression, Waddell's, Kernig's tests all being negative and bilateral straight leg raise being normal at 90 degrees. Adam's sign was negative. The mental status and cerebellar examination were normal. Dr. De Jesus' impression was that plaintiff's post traumatic headaches and any alleged cervical and lumbar spine injury had resolved. She further opined that plaintiff had a normal neurological examination. From a neurological point of view, there was no evidence of radiculopathy, permanency or disability.

Based upon the above, defendants have made out a *prima facie* case that plaintiff's injuries did not meet the threshold requirements for serious injury as regards the categories of loss of use, permanent consequential limitation or significant limitation.

As to plaintiff's 90/180 claim as well, defendants have made out a *prima facie* case. Plaintiff, in his deposition testimony, stated that he missed two months of work (Exhibit E, p.

93).

Since defendants have made out a *prima facie* case that a serious injury has not been sustained, the burden shifts, and it is incumbent upon plaintiff to produce sufficient evidence in admissible form to raise a triable issue of fact as to whether plaintiff sustained a serious injury.

In opposing the motion, plaintiff submits affirmations from Laurian Jacoby, M.D., a psychiatrist, dated February 1, 2011 and September 25, 2009 (Exhibit A); the affirmed narrative report of Randolph Rosarion, M.D., dated April 30, 2007 (Exhibit A); and the affirmation of Ronald Schlifman, M.D., a radiologist, dated February 7, 2011, incorporating his report, dated May 28, 2008, of plaintiff's MRI examination of plaintiff's cervical spine, taken on May 28, 2008.


“In order to prove the extent or degree of physical limitation, an expert's designation of a numeric percentage of a plaintiff's loss of range of motion can be used to substantiate a claim of a serious injury (*see e.g. Dufel*, 84 N.Y.2d at 798; *Lopez*, 65 N.Y.2d at 1020). An expert's *qualitative* assessment of a plaintiff's condition also may suffice, provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system (*see Dufel*, 84 N.Y.2d at 798).” *Toure v. Avis Rent A Car*, 98 N.Y.2d 345 (2002). To raise a triable issue of fact, plaintiff's physician must delineate a specific percentage of the loss of range of motion or a sufficient description of the quantitative nature of plaintiff's limitations based on the normal function, purpose and use of the body part. *Vasquez v. Reluzco*, 28 A.D.3d 365 (1st Dept. 2006); *Bent v. Jackson*, 15 A.D.3d 46, 49 (1st Dept. 2005). Dr. Rosarion, in his examination of plaintiff on April 30, 2007, failed to define or quantify the extent of plaintiff's alleged injuries or compare

plaintiff's condition to the normal function, purpose and use of the affected body organ, member, function or system. Instead, he merely states that this plaintiff's range of motion testing for the cervical and lumbar spine revealed moderate (cervical) and severe-to-moderate (lumbar) restrictions in all planes. Dr. Jacoby did not examine plaintiff until more than one year and four months after the accident. Consequently, there is a failure of proof as to causation due to the absence of a contemporaneous range of motion assessment. *Clemmer v. Drah Cab Corp.*, 74 A.D.3d 660 (1st Dept. 2010); *Guadalupe v. Blondie Limo, Inc.*, 43 A.D.3d 699 (1st Dept. 2007).

Plaintiff's claim that he sustained a non-permanent medically determined injury that prevented him from performance of his usual and customary daily activities for 90 of 180 days immediately subsequent to his injuries, is not supported by objective medical proof. *Lattan v. Gretz Trans, Inc.*, 55 A.D.3d 449, 865 N.Y.S.2d 599 (1st Dept. 2008). Therefore, the motions are granted.

The foregoing constitutes the Decision and Order of the Court.

Dated: 5/23/11



MARK FRIEDLANDER, J.S.C.