

Gouskos v Cohen

2012 NY Slip Op 31409(U)

April 10, 2012

Supreme Court, Suffolk County

Docket Number: 31499/2009

Judge: Ralph T. Gazzillo

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SHORT FORM ORDER

Supreme Court - State of New York
IAS PART 6 - SUFFOLK COUNTY

MOT. SEQ: 002 MD; 003 MD
004 MD

PRESENT:

Hon. RALPH T. GAZZILLO
A.J.S.C.

-----X	:	
MICHAEL GOUSKOS,	:	SILVERSTEIN & KAHN, ESQS.
	:	Attorneys for Plaintiff
Plaintiff(s),	:	1160 East Jericho Turnpike
- against -	:	Huntington, N.Y. 11743
	:	
AMY COHEN,	:	DESENA & SWEENEY, LLP
	:	Attorneys for Defendant
Defendant(s).	:	1383-32 Veterans Memorial Hwy.
-----X	:	Hauppauge, N.Y. 11788

Upon the following papers numbered 1 to 32 read on three motions; Notice of Motion and supporting papers numbered 1-6 (mot seq 002) ; Notice of Motion and supporting papers numbered 6-12 (mot seq 003); Notice of Motion and supporting papers numbered 12-22 (mot seq 004); Affirmation in Opposition and supporting papers numbered 23-30; Replying Affidavits and supporting papers numbered 31-32; it is,

ORDERED that the defendant's motion (mot seq 002) pursuant to CPLR §3126(3) seeking to dismiss the complaint based upon the plaintiff's failure to appear for court ordered depositions is denied as moot, and it is further

ORDERED that the defendant's motion (mot seq 004) pursuant to CPLR §3126(3) seeking to dismiss the complaint based upon the plaintiff's failure to comply with the Supplemental Notice for Discovery and Inspection and Inspection Post Deposition dated October 7, 2010 is denied as moot, and it is further

ORDERED that this motion (mot seq 003) by defendant for an order pursuant to CPLR §3212 granting summary judgment in her favor dismissing the complaint on the grounds that plaintiff Michael Gouskos did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) as a result of the subject accident is denied.

ORDERED that counsel for movant shall serve a copy of this Order with Notice of Entry upon counsel for all other parties, pursuant to CPLR §§2103(b)(1), (2) or (3), within thirty (30) days of the date the order is entered and thereafter file the affidavit(s) of service with the Clerk of the Court

This is an action to recover damages for injuries allegedly sustained by plaintiff on June 13, 2008 as well as resulting property damage when their vehicle, operated by plaintiff, was struck in the rear by a vehicle owned and operated by defendant Amy Cohen on Commack Road at or near its intersection with Dorothea Street, in Commack, New York.

Plaintiff Michael Gouskos, alleges in his bill of particulars that as a result of said accident he sustained serious injuries including; traumatic injuries to his back and neck including Central Posterior Disc Herniation at L4-L5 and L5-S1, both encroaching upon the Ventral Aspect of the Thecal Sac, with Bilateral-Sub S1 Lumbar Radiculopathy, Lumbar Derangement, with sprain and strain of the Lumbar Spine with pain, spasms, exacerbation of pain, limitation of motion, loss of function and use with damage to the underlying muscles, tendons, ligaments, fascia, soft tissues, blood vessels, capillaries and nerves in and about the injury site. Further, plaintiff claims posterior disc bulges at the C2-C3 and C3-C4 favoring the right side and encroaching upon the Ventral Aspect of the Thecal Sac, Posterior Disc Bulges at C4-C5, C5-C6, encroaching upon the Ventral Aspect of the Thecal Sac, with Cervicogenic Headaches and associated cognitive impairment, with Cervical Radiculopathy with myofascial pain, Cervical Derangement with sprain and strain of the Cervical Spine, with pain, spasms, exacerbation of pain, limitation of motion, loss of function and use with damage to the underlying muscles, tendons, ligaments, fascia, soft tissues, blood vessels, capillaries and nerves in or about the injury site. In addition, plaintiff claims Posterior Disc Bulge at T10-T11 with impression on the ventral aspect of the Thecal Sac, Thoracic Derangement with sprain and strain of the thoracic spine, Thoracic Myalgia, with pain, spasms, exacerbation of pain on motion, limitation of motion, loss of function and use with damage to the underlying muscles, tendons, ligaments, fascia, soft tissue, blood vessels, capillaries and nerves in and about the injury site.

In addition, plaintiff alleges that following the subject accident, he was confined to bed and home for a period of 26 weeks except to attend employment or to obtain medical treatment. At the time of the accident, plaintiff was employed in IT project management at MSC Industrial Supply Company. Plaintiff also alleges that he sustained a "serious injuries resulting in significant disfigurement, permanent loss of a body function or part, and a medically determined injury that preventing plaintiff from substantially all material aspects which constitute his actual and customary daily activities for a period exceeding 90 days from the date of the occurrence as well as an economic loss greater than basic economic loss as defined in Insurance Law § 5102 (a). Plaintiff's asserts in his affidavit that almost three years following the accident, he still experiences daily severe low back pain, intermittent neck pain and that, as a result, he is unable to participate in his usual physical activities including housework, carrying heavy things, construction and renovation projects, gardening and walking for long distances. According to the plaintiff, he takes pain medication daily to alleviate the pain from the injuries he received in the June 13, 2008 accident. He further states that he was confined to his home other than for work and for medical

appointments for a period of approximately six months following the accident.

Defendant now moves for summary judgment in her favor dismissing the first cause of action of the complaint on behalf of plaintiff on the grounds that plaintiff did not sustain a “serious injury” as defined in Insurance Law § 5102 (d) as a result of the subject accident. In support of his motion, defendant submits the summons and complaint; defendant’s answer; plaintiffs’ bill of particulars; the deposition transcript of plaintiff; the affirmed report dated January 14, 2011 of defendant’s examining orthopedist, Vartkes Khachadurian M.D. based upon an examination of plaintiff on said date; the affirmed report dated May 5, 2011 of defendant’s examining radiologist Dr. Melissa Sapan Cohn, based on a review of plaintiff’s cervical spine MRI’s performed in September 4, 2008.

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.”

In order to recover under the “permanent loss of use” category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (*Oberly v Bangs Ambulance Inc.*, 96 NY2d 295). To prove the extent or degree of physical limitation with respect to the “permanent consequential limitation of use of a body organ or member” or “significant limitation of use of a body function or system” categories, either objective evidence of the extent, percentage or degree of the limitation or loss of range of motion and its duration based on a recent examination of the plaintiff must be provided or there must be a sufficient description of the “qualitative nature” of plaintiff’s limitations, with an objective basis, correlating plaintiff’s limitations to the normal function, purpose and use of the body part (see, *Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345; *Mejia v DeRose*, 35 AD3d 407).

It is for the court to determine in the first instance whether a prima facie showing of “serious injury” has been made out (see, *Tipping-Cestari v Kilhenny*, 174 AD2d 663). The initial burden is on the defendant “to present evidence, in competent form, showing that the plaintiff has no cause of action” (*Rodriguez v Goldstein*, 182 AD2d 396). Once defendant has met the burden, plaintiff must then, by competent proof, establish a prima facie case that such serious injury exists (*Gaddy v Eyley*, 79 NY2d 955). Such proof, in order to be in a competent or admissible form, shall consist of affidavits or affirmations (*Pagano v Kingsbury*, 182 AD2d 268). The proof must be viewed in a light most favorable to the nonmoving party, here, the plaintiff (*Cammarere v Villanova*, 166 AD2d 760).

Here, defendant has failed to establish his prima facie entitlement to judgment as a matter of law by demonstrating that plaintiff did not sustain a “serious injury” within the meaning of Insurance Law § 5102 (d) as a result of the subject accident (see, *Siegel v Sumaliyev*, 46 AD3d

666; *Lea v Cucuzza*, 43 AD3d 882). Plaintiff's chiropractor, Dr. Richard Block performed range of motion testing using a Dual Inclinometer which measured the range of motion and determined that the plaintiff had range of motion deficits in multiple areas. In addition, Dr. Block performed the following additional tests; Yeoman's, Maximum Cervical Compression, Distraction and Kemp's Standing all of which showed a reduction in plaintiff's range of motion. In addition, Dr. Sawey A. Harhash, prepared a comprehensive report wherein, *inter alia*, he indicates that, based upon objective and subjective tests he conducted, his opinion is that there is a causal relationship between the injuries sustained by the plaintiff and the motor vehicle accident of June 13, 2008. In addition, Dr. John Himelfarb, reviewed and reported on the plaintiff's MRI indicating that plaintiff suffered disc herniation at the L-4-5 level as well as the L5-S1 level. Further, in August of 2011, Dr. Block, plaintiff's chiropractor indicated that the plaintiff's injuries are producing long term pain and permanent disability which precludes the plaintiff from performing his usual household tasks and everyday activities due to "severe neck and back pain" is continuing. Plaintiff's physician, Dr. Harhash describes plaintiff's injury as "serious" and his prognosis for recovery as "guarded".

Although defendant's physician Dr. Khachadurian reported that when he examined plaintiff in January 2011, three and one half years after the accident, he found that plaintiff's range of motion testing results for his shoulders, elbows, wrists, hands, hips, cervical spine and thoracolumbar spine, when compared with normal measurements, were all normal, the range of motion tests performed by Dr. Khachadurian were performed without the use of a subjective measurement or test method such as a Dual Inclinometer or Goniometer. Accordingly, the tests performed by Dr. Khachadurian were subjective rather than objective. Also conclusory is Dr. Melissa Sapan Cohn's evaluation of plaintiff's 2008 MRI wherein, without independent support or information, she determined that plaintiff's disc issues degenerative and are "not related to trauma".

Where a physician fails to specify what objective tests were used to reach his conclusions, it is a fatal flaw to defendants' summary judgment motion even if the physician's report sets forth measurements for the tested range of motion (see, *Charley v. Goss*, 54 A.D.3d 569, e.g. *Offman v. Singh*, 27 A.D.3d 284; *Rivera v. Benaroti*, 29 A.D.3d 340).


Lastly, defendant's counsel, in his reply papers, argues that plaintiff's complaint should be dismissed because plaintiff failed to "adequately address a prior motor vehicle incident". Defendant is incorrect in this regard. Plaintiff's chiropractor affirms that "prior to the accident on June 13, 2008, Mr. Gouskos had no recent history of trauma, complaints of pain, limitation of motion or loss of function in the lumbar and cervical spine. That his lumbar and cervical complaints are solely caused by and as a result of the subject accident". In addition, Dr. Block affirms "with reasonable medical certainty" that the injuries he treated the plaintiff for are "causally related to the automobile accident as was described..." to him. Dr. Harhash's report also indicates that "there is no significant past medical history" and that there was a causal relationship between the June 13, 2008 accident and the plaintiff's injuries. Clearly, each of the health professionals that treated the defendant inquired as to his medical history and determined that same was insignificant with regard to the injuries that were presented to them by the plaintiff. Although defendant claims that plaintiff's failure to refute the pre-existing injury mandates dismissal of the plaintiff's case, defendant has submitted no evidence of any such injury. Plaintiff testified at his deposition that he

had not had any treatment for the earlier accident which took place sometime during the early 1980's, other than for short period of time immediately following that accident. Without further documentary evidence, defendant's unsupported allegations that the motor vehicle accident plaintiff was involved in approximately 25 years ago is the cause of plaintiff's injuries, is insufficient to shift the burden to the plaintiff. (*c.f.*, ***Franchini v Palmieri***, 1 N.Y.3d 536.)

Defendant has failed to "to present evidence, in competent form, showing that the plaintiff has no cause of action" (***Rodriguez v Goldstein***, 182 AD2d 396, 582 NYS2d 395, 396 [1st Dept 1992]). Viewing the defendant's submissions in a light most favorable to the nonmoving party, here, the plaintiff, defendant has failed to meet its burden of showing that a serious injury does not exist. (***Cammarere v Villanova***, 166 AD2d 760).

Accordingly, the defendant's motion for summary judgment is denied in its entirety.

Dated: 4/20/12
RIVERHEAD, NY


Ralph T. Gazzillo
A.J.S.C.

NON-FINAL DISPOSITION