

Gizze v Hearst Communications, Inc.

2012 NY Slip Op 32040(U)

July 13, 2012

Supreme Court, New York County

Docket Number: 101597/10

Judge: Cynthia S. Kern

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SCANNED ON 8/3/2012

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

PRESENT: _____
Justice

PART _____

Index Number : 101597/2010

GIZZE, JOHN

vs.

HEARST COMMUNICATIONS

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s) _____

Answering Affidavits — Exhibits _____ | No(s) _____

Replying Affidavits _____ | No(s) _____

Upon the foregoing papers, it is ordered that this motion is

FILED
AUG 02 2012
NEW YORK COUNTY CLERK'S OFFICE

is decided in accordance with the annexed decision.

RECEIVED

AUG 1 - 2012

MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

Dated: 7/31/12

PK, J.S.C.

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

-----x
JOHN GIZZE,

Plaintiff,

Index No. 101597/10

-against-

DECISION/ORDER

HEARST COMMUNICATIONS, INC. and
959 EIGHTH AVENUE CONDOMINIUM,

Defendants.

-----x
HON. CYNTHIA S. KERN, J.S.C.

FILED
AUG 02 2012
NEW YORK
COUNTY CLERKS OFFICE

Recitation, as required by CPLR 2219(a), of the papers considered on the review of this motion for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Notice of Cross Motion and Answering Affidavits.....	<u>2</u>
Affirmations in Opposition to the Cross-Motion.....	<u>3</u>
Replying Affidavits.....	<u>4</u>
Exhibits.....	<u>4</u>

Plaintiff John Gizze commenced the instant action seeking damages for personal injuries he allegedly sustained when he was struck by a falling piece of ice in the course of his employment. Defendants now move for summary judgment dismissing plaintiff's claim to the extent it alleges a right biceps tear injury and dismissing his claim for lost wages. For the reasons set forth more fully below, defendants' motion is granted in part and denied in part.

The relevant facts are as follows. At the time of the accident plaintiff worked as a furniture installer, moving and installing furniture into commercial spaces. On February 17, 2007, falling snow and/or ice fell from the building located at 959 Eight Avenue in Manhattan,

striking plaintiff, who was standing on the sidewalk there while on a break. Plaintiff testified that the ice that hit him hit the top of his head and his right shoulder. He went home and either later that day (according to plaintiff's testimony) or the next day (according to the medical records) went to the emergency room at New Island Hospital. The hospital found that he had full range of motion in his right arm and performed a CT scan of his head, which was negative.

Plaintiff returned to work the Monday after his accident, which occurred on a Saturday. Ten days after the accident, plaintiff went to see Dr. Paul Post, who specializes in orthopedics. Dr. Post reported that plaintiff was complaining of pain in the right side of his neck and right arm. Dr. Post found "a bunching up of the biceps muscle" and that the area was tender and concluded that plaintiff had sustained a "contusion derangement right shoulder with partial tear biceps tendon right" "as a result of his accident of 2/17/07." Plaintiff testified that he missed approximately 5 days of work in the three months following the accident due to pain and did not miss any thereafter due to the accident. He continued to work as a furniture installer, lifting heavy furniture. Plaintiff also continues to do curls with 10 pound weights and 20 push-ups twice a week, but states that when he does so, it causes pain in his right arm.

Plaintiff states that he saw Dr. Post three or four times within the first three months of his accident for pain in his neck and right shoulder. He then apparently did not see another doctor about this alleged injury until nearly 4 years later, when he saw Dr. Ajendra Sohal in connection with his Workers' Compensation claim. Dr. Sohal, a specialist in physical medicine and rehabilitation, found that plaintiff's "right biceps seem to be weak and possible partial tear of the biceps may be there." At a subsequent visit, Dr. Sohal found "clinical evidence of right biceps tear sustained at the time of the accident." Defendants' expert, Dr. William J. Kulak, examined

plaintiff on January 30, 2012. Dr. Kulack specifically found that “there is evidence of a mild partial muscle bell tear to the right biceps, however it is, [sic] not felt to be from this accident and the mechanism of injury that would produce it again, by the claimant’s history, is inconsistent with this accident.” Dr. Kulak further found that the medical records “do not clearly indicate any direct trauma to the right biceps,” stated that plaintiff himself indicated that the trauma was to his head and right trapezius, not his right bicep, and stated that the surveillance video of the accident showed plaintiff folding his arms inward in such a way as to protect the anterior part of his arms. Dr. Kulak concluded explicitly that any injury to plaintiff’s right bicep is unrelated to the subject accident. Defendants, although not Dr. Kulak, suggest that plaintiff’s injury might stem from the fact that his job involves heavy lifting and/or the weight lifting that plaintiff continues to do.

Defendants’ motion for summary judgment dismissing plaintiff’s claim asserting a right biceps injury is denied as plaintiff raises an issue of fact as to whether the falling ice caused such an injury. To establish a prima facie claim for negligence, a plaintiff must show: (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom.” *Solomon by Solomon v City of New York*, 499 N.Y.S.2d 392 (1985). Defendants make out their prima facie case by submitting the affirmation of Dr. Kulak, who states unequivocally that any injury to plaintiff’s right bicep was not caused by the accident of February 17, 2007. This is sufficient to meet defendants’ burden of establishing that the injury at issue was not caused by the subject accident.

Plaintiff then meets his burden to raise an issue of fact by submitting the affidavit of Dr. Post, who concluded that plaintiff did suffer a right biceps tear caused by the February 2007 accident. Although defendants argue that this affidavit is insufficient in light of the fact that the

records from New Island Hospital do not reveal any injury to plaintiff's right arm, Dr. Post's affidavit is sufficient to raise a question of fact and defendants may cross-examine him at trial as to any evidence they believe is conflicting or undermines his conclusion. Similarly, they may cross-examine plaintiff regarding why he did not complain about right arm pain during his visit to the emergency room and why he waited 10 days to see Dr. Post. Finally, defendants argue that plaintiff ignores two negative "tests" regarding his right bicep. Assuming that defendants are referring to the two x-rays of defendants' right arm, this argument is specious as there is no evidence that they showed defendants' right bicep muscle. Finally, defendants cite cases for the proposition that a cessation of treatment severs the causal connection between the injuries and the accident. However, the cited cases are all in the "serious injury" context and are therefore inapposite.

Defendants are entitled to summary judgment dismissing plaintiff's claim for lost wages. In his supplemental bill of particulars plaintiff asserts lost earnings of \$74,880 as a result of being "incapacitated from employment for 124.8 weeks." Defendants meet their burden of establishing that plaintiff did not sustain lost wages by pointing to plaintiff's testimony that he only missed approximately 5 days of work in the three months following the accident, nowhere near the figure of 124.8 weeks that he alleges he was incapacitated and could not work. Defendants also point to the lack of evidence that plaintiff lost any wages from even those 5 days of missed work. In response, plaintiff fails to raise an issue of fact. Plaintiff does not submit a reply affidavit and points to no other evidence in the record regarding his lost wages claim. Because the court has found that defendants are entitled to summary judgment dismissing plaintiff's lost wages claim on these grounds, it need not reach the issue of whether the determination of the Workers'

