

Graciani v Vidal

2013 NY Slip Op 33800(U)

July 18, 2013

Supreme Court, County of Bronx

Docket Number: 307527/10

Judge: Howard H. Sherman

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

-----x
 Anthony Graciani

Plaintiff,

Index No.: 307527/10

-against-

Decision and Order

Gil Vidal and
 NYLL Management Ltd.,

Defendants
 -----x

Facts and Procedural Background

Plaintiff seeks recovery for injuries allegedly sustained on June 10, 2008, in a two-car collision that occurred at or near the intersection of Hunts Point Avenue and Bruckner Boulevard in Bronx County.

The action was commenced in September 2010, and issue was joined with the service of defendants' answer in the following month.

The Note of Issue was filed on September 25, 2012.

Plaintiff alleges that he sustained *inter alia*, the following injuries as a result of the accident: **lumbar spine** : disc herniations at L3-4 and L4-5, lumbago secondary to trauma, and restriction of the range of motion; **cervical spine**: multilevel disc protrusions and bulging at C6-7, and restriction of the range of motion [Verified Bill of Particulars ¶ 11].

All injuries are alleged to be permanent and to qualify as serious injuries as defined as a permanent loss of use of a body organ,¹ member, function or system; a permanent

¹ There is no evidence here to support a claim that the soft tissue injuries asserted qualify as a permanent loss of use of the affected areas (see, Oberly v Bangs Ambulance, 96 NY2d 295, 299, 751

consequential limitation of a body organ or member; a significant limitation of use of a body function or system, and/or a medically determined injury or impairment which prevented plaintiff from performing all of the material acts which constitute his usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident [Id. ¶ 20].

Plaintiff alleged that he was incapacitated from her employment for eleven days [Id. ¶ 14].

Motion

Defendants timely move for an award of summary judgment asserting that plaintiff did not sustain a serious injury in the underlying motor vehicle accident . In support defendants submit copies of the pleadings and the verified Bill of Particulars (Exhibits A,B,D); the affirmed report of the independent medical examination conducted by Gregory Montalbano , M.D. [Exhibit F], and the transcript of plaintiff's 07/20/12 examination before trial (Exhibit E).

Independent Medical Evaluation

- 1) Defendants submit the affirmed report of an October 26, 2012 independent orthopedic evaluation .

N.E.2d 457, 727 N.Y.S.2d 378 [2001]).

Plaintiff presented with complaints of pain in the neck on rainy days, and more frequent pain in the lower back, as well as stiffness in the morning .

Upon examination, Dr. Montalbano found full range of motion² in all planes of the **cervical spine** as quantified and compared to normal readings , and neither paraspinal spasm nor tenderness was observed.

There was full range of motion in all planes of the Lumbar /thoracic spine as quantified and compared to normal readings, and Straight leg raising was negative, bilaterally. There was no evidence of tenderness or of paraspinal muscle spasm.

Upon his clinical findings and upon review of plaintiff's medical records, including reports of diagnostic studies and medical evaluations and treatment records for the period June 13, 2008 through December 11, 2008, Dr. Montalbano opined with a reasonable degree of medical certainty that plaintiff did not sustain any permanent injury to the cervical or lumbar spine as a result of the motor vehicle accident, and that he had a pre-existing condition of degenerative spinal disease consistent with his age [38] , and obesity [230 lbs.].

Contemporaneous Medical Records

Defendants submit the reports of EMG examinations conducted in July-August 2008, revealing that the tests of the upper and extremities were normal.

Deposition

In pertinent part, plaintiff testified that he drove away from the scene of the accident and went to work [GRACIANI EBT: 71-75]. A day or two later, he went to a clinic on

² The measurements were determined using a goniometer and in accordance with values gleaned from NYS Office of Temporary and Disability Assistance, and Workers' Compensation Guidelines as well as the AMA's Guides to the Evaluation of Permanent Impairment 5th Edition

Prospect and 149th Street, complaining of neck, back and right^{two} pain [Id. 84-86]. For a period in excess of six months, he underwent treatment including one or two injections for lower back pain as well as physical therapy [Id. 92-97]. Plaintiff received no further treatment for accident-related injuries and testified that he stopped feeling pain in his knee a couple of months after the accident, and in his neck, a year later [Id. 117; 103].

DISCUSSION AND CONCLUSION

Upon review of the findings by objective testing upon recent examination revealing a complete resolution of the injuries asserted, including findings of full ranges of motion in all planes of the cervical and thoraco/lumbar spine as quantified and compared to normal readings, and the lack of other evidence of orthopedic disability or permanency, as well as the testimony of plaintiff with respect to his ability to return to work immediately after the accident, and the loss of only eleven days of employment due to his injuries, it is submitted that defendants have met their *prima facie* burden to establish that plaintiff did not sustain a serious injury as a result of the subject motor vehicle accident.

Upon this showing, it is incumbent upon the plaintiff to come forward "with an objective medical basis supporting the conclusion that she sustained a serious injury (see Toure v Avis Rent A Car Sys., 98 NY2d 345, 350-351, 774 NE2d 1197, 746 NYS2d 865 [2002])." Baez v. Rahamatali, 6 N.Y.3d 868, 869 ; 850 N.E.2d 19 [2006] Plaintiff has failed to do so.


No opposition is interposed.

Accordingly, it is ORDERED that the motion be and hereby is granted on default and pursuant to CPLR 3212, and and it is further

ORDERED that summary judgment be entered in favor of defendants dismissing the complaint on the grounds that plaintiff did not sustain a serious injury.

This constitutes the decision and order of this court.

Dated : July 18, 2013



Howard H. Sherman