

Gretsuk v Diamond Cars Inc.
2014 NY Slip Op 31008(U)
March 25, 2014
Supreme Court, Suffolk County
Docket Number: 16150/2012
Judge: William B. Rebolini
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Short Form Order

COPY**SUPREME COURT - STATE OF NEW YORK****I.A.S. PART 7 - SUFFOLK COUNTY****PRESENT:****WILLIAM B. REBOLINI**
Justice

Nicholas Gretsuk and Donna Gretsuk,

Plaintiffs,

-against-

Diamond Cars Inc. and Robert Greenstein,

Defendants.

Motion Sequence No.: 001; MDMotion Date: 11/26/13Submitted: 1/29/14Index No.: 16150/2012Attorney for Plaintiff:Amideo Nicholas Guzzone & Assoc.
2450 Middle Country Road
Centereach, NY 11720Attorney for Defendants:Baker, McEvoy, Morrissey
& Moskovits, P.C.
1 Metro Tech Center
Brooklyn, NY 11201Clerk of the Court

Upon the following papers numbered 1 to 21 read upon this motion for summary judgment: Notice of Motion and supporting papers, 1 - 10, 11; Answering Affidavits and supporting papers, 12 - 19; Replying Affidavits and supporting papers, 20 - 21; it is

ORDERED that motion (001) by defendants, Diamond Cars Inc. and Robert Greenstein, pursuant to CPLR 3212 for summary judgment dismissing the complaint on the basis that the plaintiff, Nicholas Gretsuk, did not sustain a serious injury as defined by Insurance Law §5102 (d) is denied.

In this negligence action, the plaintiff, Nicholas Gretsuk, seeks damages for serious personal injuries he alleges he sustained on April 28, 2011 on I495W, in Queens County, New York when his vehicle was involved in a collision with the vehicle operated by defendant Robert Greenstein and



Gretsuk v. Diamond Cars Inc.

Index No.: 16150/2012

Page No. 2

owned by Diamond Cars, Inc. A derivative claim has been asserted by Donna Gretsuk, plaintiff's spouse.

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 eliminate any material issues of fact from the case (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]). To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center, supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]).

In support of motion (001), the defendant has submitted, inter alia, an attorney's affirmation; copies of the summons and complaint and defendants' answer; reports of Edward M. Weiland, M.D. dated April 11, 2013 concerning his independent neurological examination of the plaintiff, Samuel M. Rock PhD. notarized April 4, 2014 concerning his independent psychology evaluation of the plaintiff, Scott A Springer, D.O. dated October 27, 2013 concerning his independent radiological reviews of plaintiff's cervical spine MRIs of May 3, 2011, and May 30, 2012, and lumbar spine MRIs of September 7, 2011 and May 30, 2012; and the transcript of the examination before trial of Nicholas Gretsuk dated February 26, 2013.

Pursuant to Insurance Law § 5102 (d), "[s]erious injury" means 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."

The term "significant," as it appears in the statute, has been defined as "something more than a minor limitation of use," and the term "substantially all" has been construed to mean "that the person has been curtailed from performing his usual activities to a great extent rather than some slight curtailment" (*Licari v Elliot*, 57 NY2d 230, 455 NYS2d 570 [1982]).

In order to recover under the "permanent loss of use" category, a plaintiff must demonstrate a total loss of use of a body organ, member, function or system (*Oberly v Bangs Ambulance Inc.*,

Gretsuk v. Diamond Cars Inc.

Index No.: 16150/2012

Page No. 3

96 NY2d 295, 727 NYS2d 378 [2001]). 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 a specific percentage of the loss of range of motion must be ascribed 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 (*Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 746 NYS2d 865 [2000]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*Licari v Elliott, supra*).

By way of his verified bill of particulars, the plaintiff alleges that as a result of this accident he sustained injuries consisting of C5-6 broad central to left paracentral disc herniation that effaces the ventral thecal sac with flattening of the central cord contour; 1-2 mm retrolisthesis of C5 on C6; annular tear at C4-5; bilateral C5-6 radiculopathy; reversal of the normal cervical lordosis; cervical muscle spasm, and cervical sprain/strain; cervicgia; cervical neuritis; cervical cranial syndrome; loss of range of motion of the cervical spine; L3-4 disc bulge and central to left paracentral disc herniation with annular tear which results in bilateral neural foraminal narrowing with encroachment upon the left lateral recess; L4-5 disc bulge and broad right paracentral disc herniation with annular tear which results in neural foramina narrowing with effacement of the right lateral recess; L5-S1 right paracentral disc protrusion which results in impingement upon the right S1 nerve root; lumbar radiculitis; lumbar muscle spasm and sprain/strain; loss of range of motion of the lumbar spine; thoracic spine sprain/strain; loss of range of motion of the thoracic spine; coarse tremor in the right upper extremity; tremor in the right hand; segmental dystonia in the right upper extremity; decreased sensation to temperature over the right upper extremity; parasthesia, numbness, tingling, and weakness in both right and left arms; pain and tenderness in both right and left shoulders; weakness in both right and left legs; cerebral concussion; post-concussion syndrome; post-traumatic stress disorder; headaches; depression; anxiety; adjustment disorder; cognitive disorder (NEC); balance problems; decreased focus; difficulty concentrating; confusion; blurry vision; episodic dizziness; vertigo; and nausea.

Upon review of the defendants’ evidentiary submissions, it is determined as a matter of law that the defendants have not established prima facie entitlement to summary judgment pursuant to either category of injury defined by Insurance Law § 5102 (d).

The defendants failed to support this motion with copies of the medical records and reports for the MRI studies of the plaintiffs’ cervical spine and lumbar spine, which films were reviewed by Dr. Springer, and the nerve studies referred to by Dr. Weiland. The general rule in New York is that an expert cannot base an opinion on facts he did not observe and which are not in evidence, and the expert testimony is limited to facts in evidence (*see Allen v Uh*, 82 AD3d 1025, 919 NYS2d 179 [2d Dept 2011]; *Marzuillo v Isom*, 277 AD2d 362, 716 NYS2d 98 [2d Dept 2000]; *Stringile v Rothman*, 142 AD2d 637, 530 NYS2d 838 [2d Dept 1988]; *O’Shea v Sarro*, 106 AD2d 435, 482 NYS2d 529 [2d Dept 1984]; *Hornbrook v Peak Resorts, Inc.*, 194 Misc2d 273, 754 NYS2d 132 [Sup Ct, Tomkins County 2002]). Such records are not in evidence, precluding summary judgment.

Gretsuk v. Diamond Cars Inc.

Index No.: 16150/2012

Page No. 4

It is additionally noted that Dr. Weiland and Dr. Rock both stated that there were no legally authenticated medical records provided for review, and if such records were available at any later time, each would be pleased to review the records and advise whether the records have any effect on their respective opinions. Thus, the court is left to speculate as to whether or not their respective opinions would be affected by review of plaintiff's records, precluding summary judgment.

Dr. Weiland does not address the findings of the various nerve conduction studies performed on the plaintiff and has not ruled out that the plaintiff's claimed injuries of cervalgia and radiculitis, and other neurological complaints are causally related to the subject accident.

Dr. Springer does not address plaintiff's alleged injury relating to the 1-2 mm retrolisthesis of C5 on C6 or the annular tear at C4-5 and bilateral C5-6 radiculopathy, raising factual issues.

Dr. Rock opined that the plaintiff's psychological prognosis is guarded due to his not having worked in nearly two years since the accident, thus, raising factual issues which precludes summary judgment.

None of the examining and reviewing physicians have provided a copy of their respective curriculum vitae and have not otherwise set forth their respective education, training, or work experience to qualify as experts to render opinions in this matter. Although the plaintiff alleges various herniated discs and weakness in his arms and legs, and was treated by an orthopedic surgeon, Dr. Galla, no report from an examining orthopedist has been provided by defendants (*see McFadden v Barry*, 63 AD3d 1120, 883 NYS2d 83 [2d Dept 2009]; *Browdame v Candura*, 25 AD3d 747, 807 NYS2d 658 [2d Dept 2006]; *Lawyer v Albany OK Cab Co.*, 142 AD2d 871, 530 NYS2d 904 [3d Dept 1988]; *Faber v Gaugler*, 2011 NY Slip Op 32623U, 2011 NY Misc Lexis 4742 [Sup Ct, Suffolk County, 2011]), precluding summary judgment.

It is further noted that the defendants' examining physicians did not examine the plaintiff during the statutory period of 180 days following the accident, thus rendering the defendants' physicians' affidavits insufficient to demonstrate entitlement to summary judgment on the issue of whether the plaintiff was unable to substantially perform all of the material acts which constituted his usual and customary daily activities for a period in excess of 90 days during the 180 days immediately following the accident (*Blanchard v Wilcox*, 283 AD2d 821, 725 NYS2d 433 [3d Dept 2001]; *see Uddin v Cooper*, 32 AD3d 270, 820 NYS2d 44 [1st Dept 2006]; *Toussaint v Claudio*, 23 AD3d 268, 803 NYS2d 564 [1st Dept 2005]). Additionally, the experts offer no opinion with regard to this category of serious injury (*see Delayhaye v Caledonia Limo & Car Service, Inc.*, 61 AD3d 814, 877 NYS2d 438 [2d Dept 2009]), precluding summary judgment.

The 38 year old plaintiff testified that he is married and has a nine year old daughter. He has been employed for six or seven years with National Elevator Cab and Door with duties involving sales, some engineering, and assistant and project management. He worked approximately 60 hours a week. On April 28, 2011, his vehicle was stopped when it was struck in the rear causing his vehicle to impact with the vehicle in front of his. He was taken by ambulance for complaints relating to his neck feeling stiff and burning. For two to three weeks following the accident, he was confined to

Gretsuk v. Diamond Cars Inc.

Index No.: 16150/2012

Page No. 5

his bed and home, and needed assistance to get out of bed. The day after the accident, he saw Dr. Sharma who referred him to Dr. Mendelsohn, a neurologist, for headaches and hand tremors. He had various testing, including MRIs of his neck, back, and brain, and CT scan. Dr. Mendelsohn referred him to an orthopedic surgeon, Dr. Galla, for treatment, and also to a neuropsychologist. Dr. Galla recommended treatment with epidural injections. He then saw Dr. Raanan who recommended acupuncture before trying epidural injections. He was to see Dr. Harrington for acupuncture, but was waiting for approval from Worker's Compensation. He had EMG testing by Dr. Mendelsohn.

The plaintiff continued that he was seen by Dr. Rubenstein for chiropractic adjustments twice a week for two and one-half years. He also treated for post-traumatic stress with Dr. Bush and Dr. Honor, both neuropsychologists. He experiences difficulties with doing calculations, estimates, and memorizing in his head when reading drawings and now has to use a calculator. He stated that it takes him longer to estimate and to understand drawings. As vice president of sales, he must attend outings with clientele, including taking clients out to golf, but he can no longer golf, which he did both at home and as part of his job prior to the accident. He currently experiences pain in his back, and in his neck radiating into his shoulders, and still has some tremors in his hand. At home, he can no longer do yard cleanup, mow the lawn, do snow removal, and heavy housework. The injuries have also interfered with his sexual relations with his wife. He has difficulty playing with his daughter.

Based upon the foregoing, the defendants failed to demonstrate entitlement to summary judgment on either category of injury defined in Insurance Law § 5102 (d) (*see Agathe v Tun Chen Wang*, 98 NY2d 345, 746 NYS2d 865 [2006]); *see also Walters v Papanastassiou*, 31 AD3d 439, 819 NYS2d 48 [2d Dept 2006]). Inasmuch as the moving party has failed to establish prima facie entitlement to judgment as a matter of law in the first instance on the issue of "serious injury" within the meaning of Insurance Law § 5102 (d), it is unnecessary to consider whether the opposing papers were sufficient to raise a triable issue of fact (*see Yong Deok Lee v Singh*, 56 AD3d 662, 867 NYS2d 339 [2d Dept 2008]); *Krayn v Torella*, 40 AD3d 588, 833 NYS2d 406 [2d Dept 2007]; *Walker v Village of Ossining*, 18 AD3d 867, 796 NYS2d 658 [2d Dept 2005]).

Accordingly, motion (001) by the defendants for summary judgment dismissing the complaint on the basis that the plaintiff did not suffer serious injury as defined by Insurance Law §5102 (d) is denied.

Dated:

3/25/2014



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

_____ FINAL DISPOSITION ___X___ NON-FINAL DISPOSITION