

**Gladden v Angelini Organics LLC**

2015 NY Slip Op 31804(U)

September 22, 2015

Supreme Court, Queens County

Docket Number: 705866/2013

Judge: Robert J. McDonald

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK  
CIVIL TERM - IAS PART 34 - QUEENS COUNTY  
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD  
**Justice**

- - - - - x

MICHAEL GLADDEN, Index No.: 705866/2013  
Plaintiff, Motion Date: 09/08/15  
- against - Motion No.: 50  
ANGELINI ORGANICS LLC AND MIGUEL Motion Seq.: 3  
MILLAN,

Defendants.

- - - - - x

The following papers numbered 1 to 7 read on this motion by defendants for an order pursuant to CPLR 3212 granting defendants summary judgment and dismissing plaintiff's complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law §5104(a):

	<u>Papers Numbered</u>
Notice of Motion-Affirmation-Exhibits.....	1 - 4
Affirmation in Opposition-Exhibits.....	5 - 6
Reply Affirmation.....	7

In this negligence action, plaintiff seeks to recover damages for personal injuries he allegedly sustained as a result of a motor vehicle accident that occurred on October 2, 2013, on Francis Lewis Boulevard, at or near the intersection of Hillside Avenue, Queens County, New York. Plaintiff alleges that he sustained serious injuries to his cervical spine, thoracic lumbar spine, left wrist, and left knee as a result of the impact.

Plaintiff commenced this action by filing a summons and verified complaint on December 13, 2013. Issue was joined by service of defendants' verified answer dated February 4, 2014. Defendants now move for an order pursuant to CPLR 3212(b), granting summary judgment and dismissing plaintiff's complaint on the ground that plaintiff did not suffer a serious injury as defined by Insurance Law § 5102.

In support of the motion, defendants submit an affirmation from counsel; a copy of the pleadings; a copy of the So Ordered Stipulation extending the time to file summary judgment motions; a copy of plaintiff's verified bill of particulars and amended verified bill of particulars; a copy of the transcript of plaintiff's examination before trial taken on June 26, 2014; the report of plaintiff's orthopedic surgeon, Robert Donadt, M.D.; the affirmed medical report of orthopedic surgeon, Frank M. Hudak, M.D.; the affirmed medical report and the addendum report of orthopedic surgeon, Eial Faierman, M.D.; a copy of the Preliminary Conference Order; a copy of plaintiff's second examination before trial taken on February 18, 2015; and a copy of the sworn report of chiropractor, Ariel E. Goldin, D.C.

Plaintiff asserts that he sustained a serious injury as defined in Insurance Law § 5102(d) in that he sustained a permanent loss of use of a body organ, member function or system; a permanent consequential limitation or use of a body organ or member; a significant limitation of use of a body function or system; and a medically determined injury or impairment of a nonpermanent nature which prevented plaintiff from performing substantially all of the material acts which constitute his 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.

Dr. Hudak examined plaintiff on October 31, 2014. Plaintiff reported to Dr. Hudak that he was involved in a motor vehicle accident on October 2, 2013 at which time he sustained injuries to his lower back, neck, left knee, and left shoulder. He presented with pain to his neck, left shoulder, lower back, and left knee. Dr. Hudak performed objective range of motion testing with a goniometer, which revealed decreased ranges in motion of plaintiff's head and neck, left shoulder, and left wrist. His diagnosis was contusion/sprain of the left shoulder, resolved. Dr. Hudak further concluded that he cannot confirm that the injuries sustained to plaintiff's cervical and lumbosacral spine are causally related to the subject accident, he cannot confirm whether the plaintiff sustained a left knee injury in the subject accident, and in his opinion the operation performed on the left knee was not causally related to the subject accident. Dr. Hudak states that plaintiff has no permanency or disability and can return to the normal activities of daily living.

Defendants also submit the affirmed report of Dr. Faierman who examined plaintiff on April 28, 2015. Plaintiff stated to Dr. Faierman that he received treatments for his neck, left shoulder, left wrist, and low back as a result of the subject accident. He also stated that he underwent surgery to his left knee on

September 12, 2014, but he still has pain in his left knee. Plaintiff reported that he returned to work one week after the accident and is currently employed. His primary complaint at the time of the examination was left knee pain. Dr. Faierman performed objective range of motion testing with a goniometer, which revealed normal ranges of motion in plaintiff's cervical spine, lumbar spine, hips, shoulders, hand joints, knees. Dr. Faierman concludes that plaintiff's cervical spine strain, lumbosacral spine strain, left knee sprain are all resolved, and that the bilateral shoulder and wrist examination was unremarkable. After reviewing the MRI of the cervical spine, Dr. Faierman opines that the MRI does not reveal post-traumatic pathology. Dr. Faierman further opines that there is not any significant post-traumatic pathology in the lumbar spine and that there is a disc osteophyte complex at the L5-S1 level which is pre-existing and unrelated to the subject accident.

Dr. Goldin examined plaintiff on January 31, 2014. Plaintiff reported that he is currently being treated with chiropractic care one to two times per week. He presented with pain in the neck, middle back, and lower back. She concludes that no ongoing chiropractic treatment would be reasonable or necessary, there is no need for diagnostic testing or durable medical equipment, and plaintiff is able to work and perform the duties of his usual occupation and normal activities of daily living. Dr. Goldin also opines that "there is a cause and effect relationship between the neck, middle back and lower back complaints and the reported accident on October 2, 2013."

In his examination before trial taken on June 26, 2014, plaintiff testified that he was taken by ambulance to Long Island Jewish Medical Center following the accident. He made complaints of pain to his neck, back, left knee and left wrist to the ambulance personnel. Four days after the accident, he began treating with a chiropractor. He underwent chiropractic treatment four days a week for two to three months until he stopped in March of 2014 because of a conflict with his work schedule. He had no future appointments scheduled to treat with any other doctors or health care providers because of his accident related injuries. Prior to the accident he never injured or had pain in his neck, lower back, left wrist, left shoulder, or left knee. He still had pain in his wrist, neck, and lower back. Since the accident he can no longer go to the gym, shovel snow, help around the house, or work on cars like he used to.

Defendants' counsel contends that the medical reports, together with plaintiff's testimony at his examination before trial in which he testified that he was only confined to bed for three days, confined to his house for two weeks, and missed only

two weeks of work, is sufficient to demonstrate that plaintiff has not sustained a permanent consequential limitation or use of a body organ or member; a significant limitation of use of a body function or system; or a medically determined injury or impairment of a nonpermanent nature which prevented the plaintiff from performing substantially all of the material acts which constitute his 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 opposition, plaintiff submits an affirmation from counsel; his own affidavit; the affirmed medical report of chiropractor, Richard Pashayan, D.C.; the affirmed medical report of Robert Donadt, M.D.; the affirmed medical report of Stanley Ikezi, M.D.; the affirmed medical report of radiologist John Himelfarb, M.D.

Plaintiff was first examined on October 7, 2013 by Dr. Pashayan. He performed range of motion testing using a goniometer which revealed limitations in plaintiff's cervical spine and thoracic lumbar spine. X-rays were also taken. Dr. Pashayan diagnosed plaintiff with cervicobrachial syndrome, cervical whiplash, cervicocranial syndrome, lumbosacral disc syndrome, and thoracic radiculitis. He states that the injuries are causally related to the subject accident and would inhibit plaintiff's ability to carry out his normal activities of daily living including standing, sitting, bending, walking or prolonged physical exertion. Dr. Pashayan further opined that the limitations of motion were significant in nature and that the injuries are permanent. Dr. Pashayan referred plaintiff for MRIs of his neck and back. After reading the MRIs, Dr. Pashayan additionally diagnosed plaintiff with disc bulges at C5-6 and a disc herniation at L5-S1.

Recently, on June 12, 2015, Dr. Pashayan re-evaluated plaintiff. Upon physical examination, plaintiff still exhibited limitations in ranges of motion in his cervical spine and thoracic lumbar spine. Dr. Pashayan concludes that plaintiff's injuries are causally related to the subject accident and are significant and permanent in nature.

Dr. Donadt also examined plaintiff. Plaintiff initially presented at Dr. Donadt's office on June 10, 2014 due to left knee and left wrist pain that had not subsided. Dr. Donadt diagnosed plaintiff with left wrist contusion and left knee contusion with possible internal derangement. Thereafter, plaintiff underwent an MRI of the left knee. On September 12,

2014, plaintiff underwent arthroscopic surgery to the left knee performed by Dr. Donadt which included partial medical meniscectomy, partial lateral meniscectomy and synovectomy with excision of medial plica. Dr. Donadt opined that the injuries sustained by plaintiff were causally related to the subject accident and will continue to inhibit plaintiff's ability to carry out his normal activities of daily living. He also opined that the injuries are permanent in nature.

On June 20, 2015, Dr. Ikezi examined plaintiff and found limitations in the ranges of motion of plaintiff's cervical spine, lumbar spine, and left knee. He recommended that plaintiff begin a course of physical therapy at a rate of two to three times a week and undergo a lumbar discectomy/spinal decompression to relieve the pain as well as epidural steroid injections. On July 11, 2015, plaintiff underwent a lumbar discectomy/decompression which was performed by Dr. Ikezi. On July 25, 20145, plaintiff presented for a follow up visit and reported some improvement of his lower back pain, but still has some burning and numbness in the left leg. Dr. Ikezi opined that the injuries are causally related to the subject accident and are permanent in nature. He states that the surgery to the lumbar spine was a direct result of the subject accident. He further opined that the injuries will inhibit plaintiff's ability to carry out his normal activities of daily living including lifting, carrying, bending, pulling, leaning, prolonged periods of standing on his feet or sitting, and climbing stairs.

On a motion for summary judgment, where the issue is whether the plaintiff has sustained a serious injury under the no-fault law, the defendant bears the initial burden of presenting competent evidence that there is no cause of action (Wadford v Gruz, 35 AD3d 258 [1st Dept. 2006]). "[A] defendant can establish that a plaintiff's injuries are not serious within the meaning of Insurance Law § 5102 (d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (Grossman v Wright, 268 AD2d 79 [1st Dept. 2000]). Whether a plaintiff has sustained a serious injury is initially a question of law for the Court (Licari v Elliott, 57 NY2d 230 [1982]).

Where defendants' motion for summary judgment properly raises an issue as to whether a serious injury has been sustained, it is incumbent upon the plaintiff to produce evidentiary proof in admissible form in support of his or her allegations. The burden, in other words, shifts to the

plaintiff to come forward with sufficient evidence to demonstrate the existence of an issue of fact as to whether he or she suffered a serious injury (see Gaddy v Eyler, 79 NY2d 955 [1992]; Zuckerman v City of New York, 49 NY2d 557[1980]; Grossman v Wright, 268 AD2d 79 [2d Dept 2000]).

Plaintiff alleges that defendants failed to meet their prima facie burden because the affirmed report of Dr. Hudak demonstrates limitations of motion in plaintiff's cervical spine. Further limitations in range of motion were noted in plaintiff's shoulders and left knee subsequent to the surgery. Moreover, Dr. Faierman's report contradicts Dr. Hudak's report in that Dr. Faierman fails to note any limitations of ranges of motion. Contradictory medical reports create an issue of fact and credibility, which defeat a request for summary judgment (see Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395, 404 [1957]; Garcia v Long Island MTA, 2 AD3d 675 [2d Dept. 2003]). Lastly, Dr. Goldin's report, which states that plaintiff had full range of motion in his cervical spine, is insufficient as Dr. Goldin fails to identify the method by which the range of motion study was conducted (see Herman v Church, 276 AD2d 471 [2d Dept. 2000]). Thus, defendants failed to make a prima facie showing of entitlement to judgment as a matter of law that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d), tendering sufficient evidence to demonstrate the absence of any material issues of fact (see Winegrad v New York Univ. Med. Ctr., 64 NY2d 851[1985]; Reynolds v Wai Sang Leung, 78 AD3d 919 [2d Dept. 2010]). Where a defendant fails to meet the defendant's prima facie burden, the court will deny the motion for summary judgment regardless of the sufficiency of the opposition papers (see Ayotte v Gervasio, 81 NY2d 1062 [1993]; Barrera v MTA Long Island Bus, 52 AD3d 446 [2d Dept. 2008]; David v Bryon, 56 AD3d 413 [2d Dept. 2008]).

In any event, this Court finds that plaintiff raised triable issues of fact by submitting the affirmed medical reports attesting to the fact that plaintiff underwent left knee surgery and lumbar discectomy/decompression as a result of the accident and finding that plaintiff had significant limitations in range of motion both contemporaneous to the accident and in recent examinations, and concluding that plaintiff's limitations are permanent and resulted from trauma causally related to the accident (see David v Caceres, 96 AD3d 990 [2d Dept. 2012]; Perl v Meher, 18 NY3d 208 [2011]; Azor v Torado, 59 ADd 367 [2d Dept. 2009]; Ortiz v Zorbas, 62 AD3d 770 [2d Dept. 2009]). As such, plaintiff raised a triable issue of fact as to whether he sustained a serious injury under the permanent consequential and/or the significant limitation of use categories of Insurance Law § 5102(d) as a result of the subject accident (see Khavosov v

Castillo, 81 AD3d 903[2d Dept. 2011]; Mahmood v Vicks, 81 AD3d 606 [2d Dept. 2011]; Compass v GAE Transp., Inc., 79 AD3d 1091[2d Dept. 2010]; Evans v Pitt, 77 AD3d 611 [2d Dept. 2010]).

Accordingly, for the reasons set forth above, it is hereby,

ORDERED, that the motion by defendants for an order granting summary judgment dismissing the complaint of plaintiff MICHAEL GLADDEN is denied; and it is further

ORDERED, that this matter remains on the calendar of the Trial Scheduling Part for December 1, 2015.

Dated: Long Island City, N.Y.  
September 22, 2015

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**ROBERT J. MCDONALD**  
**J.S.C.**