

Chieco v Gorlin

2018 NY Slip Op 32617(U)

October 15, 2018

Supreme Court, Kings County

Docket Number: 507860/2014

Judge: Debra Silber

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9**

FORTUNATO CHIECO and IRENE CHIECO,

Plaintiffs,

-against-

MATTISYAHU GORLIN and ALETHA PRESCOTT,

Defendants.

DECISION / ORDER

**Index No. 507860/2014
Motion Seq. Nos. 13, 14, 15
Date Submitted: 9/13/18
Cal No. 6, 7, 8**

MATTISYAHU GORLIN ,

Third-Party Plaintiff,

-against-

**LARRY S. STRIENFELD and HARBOR VIEW
TRANSPORTATION OF STATEN ISLAND, INC.,**

Third-Party Defendants.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of third-party defendants' motion and defendants' cross motions for summary judgment.

Papers	NYSCEF Doc.
Notice of Motion, Affirmation and Exhibits Annexed.....	<u>129-150</u>
Notices of Cross Motion, Affirmations and Exhibits Annexed.....	<u>154-160,162-166</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>169-178</u>
Reply Affirmation.....	<u>180</u>

Upon the foregoing cited papers, the Decision/Order on this application is as follows:

This is a personal injury action arising out of a motor vehicle accident. Plaintiffs were passengers in a vehicle owned by third-party defendant Harbor View Transportation and operated by third-party defendant Larry S. Strienfeld, which was

involved in a multi-vehicle accident on the Belt Parkway near Cropsey Avenue on May 25, 2014. Defendants Mattisyahu Gorlin and Aletha Prescott were the owner/operators of the two other vehicles. Plaintiff Irene Chieco's claim was settled and discontinued, pursuant to a September 19, 2017 stipulation, making the portions of the motions addressed to Irene Chieco's claims academic.

In his Bill of Particulars, plaintiff Fortunato Chieco alleges that he sustained numerous injuries, including rotator cuff tears to both shoulders, herniated discs in his cervical spine and lumbar spine and a torn medial meniscus in both of his knees, and that as a result, he underwent surgery to his right shoulder (on September 29, 2014), right knee (on April 6, 2015) and lumbar spine (on December 23, 2015).

On the 90/180 category of injury, plaintiff testified that he was out of work for "months" (EBT Page 9 Lines 20-23). He is a producer and senior assignment editor at ABC TV News. He said that after the lumbar spine fusion surgery, he missed three months of work, six weeks after the shoulder surgery and two weeks after the knee surgery (EBT Pages 59-50). However, as he had the back surgery over a year after the accident, it does not qualify for this category of injury.

The movants contend that plaintiff did not sustain a "serious injury" as a result of this accident, and that his injuries have either resolved or are unrelated, pre-existing or degenerative conditions. They note that Fortunato Chieco had a prior auto accident, in 2005, and a prior roller blading accident in 2002, from which he sustained injuries and had surgeries to his left knee, left shoulder and lumbar spine. Defendants, in their cross motions, join in the third-party defendants' claims.

Plaintiff counters that movants have failed to make a prima facie showing of their entitlement to summary judgment, insofar as defendants' examining doctors have

reported inconsistent findings as to plaintiff's range of motion. In addition, plaintiff contends that his treating physician states that plaintiff sustained serious injuries as a result of the subject accident, which is sufficient to raise an issue of fact.

Movants provide affirmations from four doctors. Movants' examining orthopedist, Joseph C. Efenbein M.D., concludes that all of plaintiff's claimed injuries have resolved, and opines that despite plaintiff's subjective complaints, there were no objective findings to support them and no evidence of a disability or permanency. Similarly, movants' examining neurologist, Chandra M. Sharma, M.D., found that any cervical and/or lumbar sprain/strain had resolved, and she reports a normal neurological examination with no objective findings to support plaintiff's claimed subjective complaints. However, Dr. Efenbein and Dr. Sharma both found significant limitations in plaintiff's ranges of motion in the cervical and lumbar spine when tested, which undermines their statements that plaintiff has recovered from his injuries (see *Zamaniyan v Vrabeck*, 41 AD3d 472, 473 [2d Dept 2007] ["defendant's examining neurologist found limitations when he examined the plaintiff"]; *Scotti v Boutureira*, 8 AD3d 652 [2d Dept 2004] ["The conclusions of the movants' examining physicians that (plaintiff) had recovered from his injuries and was not disabled were directly contradicted by the observations of limitations that they had made when examining (plaintiff)"]). While these examining doctors point out the subjective nature of range of motion tests, they fail to clearly and adequately explain or substantiate, with objective medical evidence, their inference, which is not stated, that the noted limitations were self-restricted (see *Chun Ok Kim v Orourke*, 70 AD3d 995, 995-96 [2d Dept 2010]; *Chang Ai Chung v Levy*, 66 AD3d 946 [2d Dept 2009]).

The court finds that movants fail to make a prima facie case for dismissal.

Moreover, even if movants had made a sufficient showing that the plaintiff's injuries were pre-existing and not traumatically induced, with Dr. Ronald A. Paynter's evaluation of the plaintiff's emergency room records and Dr. Michael Setton's review of the plaintiff's MRI films (see *White v Dangelo Corp.*, 147 AD3d 882 [2d Dept 2017]; *Young Chan Kim v Hook*, 142 AD3d 551, 552 [2d Dept 2016]), plaintiff has raised an issue of fact as to causation, based upon his treating physician's affirmation (see *Perl v Meher*, 18 NY3d 208, 218–19 [2011]).

Dr. Joyce Goldenberg opines that the motor vehicle accident of May 25, 2014 was the competent producing cause of plaintiff's injuries to his right shoulder, right knee, cervical and lumbar spine. She also states that the injuries from this accident required the resulting surgeries, and are the cause the plaintiff's current restricted ranges of motion. In addition, she expressly controverts the conclusion of movants' doctors on the issue of causation, noting that plaintiff was asymptomatic and not receiving any medical care at the time of his May 25, 2014 accident, when he suffered a significant trauma which caused the injuries and pain in his right shoulder, right knee, neck and back, which is confirmed by objective medical evidence. In addition, she notes that as a result of the accident, plaintiff suffered exacerbations of his prior back, left shoulder and left knee injuries.

Accordingly it is

ORDERED that the motion is denied.

This constitutes the decision and order of the court.

Dated: October 15, 2018

ENTER:



Hon. Debra Silber, J.S.C.

Hon. Debra Silber
Justice Supreme Court