Garcin v Graham
2020 NY Slip Op 34968(U)
May 7, 2020
Supreme Court, Westchester County
Docket Number: Index No. 53714/2016
Judge: Sam D. Walker
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. SAM D. WALKER, J.S.C.

----------x

SUSAN GARCIN and JOSEPH GARCIN,

Plaintiffs, **DECISION & ORDER**
Index No. 53714/2016
-against- Motion Sequence 5

SCOTT GRAHAM, A&J CIANCIULLI, INC., PCT CONTRACTING, LLC and PCI INDUSTRIES, CORP,,

Defendants.

----------x

The following papers were read on the motion (Sequence#5) for an order granting A&J Cianciulli, Inc. ("A&J"), summary judgment and dismissing all causes of action asserted by the plaintiffs against A&J:

Notice of Motion/Affirmation in Support/Exhibits A-V
Memorandum of Law in Support
Affirmation in Opposition
Affirmation in Opposition/Exhibits A-B
Supplemental Affirmations
Affirmation in Opposition/Exhibits A-B
Reply Affirmation to PCT Contracting LLC's Opposition
Reply Affirmation to Plaintiff's Opposition

Factual and Procedural Background

The plaintiffs, Susan and Joseph Garcin, commenced this action on March 23, 2016, seeking damages for personal injuries Susan Garcin "(Garcin/plaintiff") allegedly sustained on September 25, 2015, when a crane rolled down the road during a construction project and crashed into a nearby building in which Garcin was working, located at 501 Ashford Avenue, Ardsley, New York. Joseph Garcin has a derivative cause of action for loss of Garcin's services. The plaintiffs filed an amended complaint on September 6, 2016, and a second amended complaint on March 15, 2018. PCI Industries Corp. ("PCI") was added as defendant by the second amended complaint, which was stipulated to by the parties.

On August 15, 2017, Main Street America Assurance Company, commenced a subrogation action (Index No. 62310/2017) against PCI, Persico Contracting & Trucking, Inc., and PCT Contracting, LLC ("PCT"). That matter was consolidated with this matter for the purpose of joint discovery and trial, by So Ordered Stipulation, dated March 23, 2018. The parties completed discovery, the note of issue was filed and the parties now file the instant motions.

PCT was retained to perform work for the project and rented the crane from the defendant, A&J. Scott Graham ("Graham") was the operator of the crane.

Garcin's bill of particulars[1] alleges that the defendants' negligent acts caused, activated, aggravated and exacerbated the following injuries, which are permanent in nature: post-traumatic stress disorder ("PTSD"); anxiety; fear; terror; radicular pathology involving left C8-T1, right C6 and bilateral C5 sensory roots; cervical radiculopathy; cervicalgia; thoracic strain and sprain; bilateral shoulder pain; loss of range of motion; spasms of cervical spine; cervical strain and sprain; cortical responses delayed; pain; and headaches. The bill of particulars also states that Garcin has been confined to home intermittently from the date of the accident to present and confined to bed intermittently from the date of the accident to present and she was prevented from performing usual and customary activities from the date of the accident to present and has been incapacitated from employment intermittently from the date of the accident to the present.

A&J now files the instant motion, arguing that it leased the crane to PCT pursuant to a Bare Rental Agreement and cannot be liable for alleged negligence as it was an off-site lessor. A&J contends that the crane was mechanically sound and there is no evidence of any mechanical failure. A&J asserts that the plaintiffs failed to meet the no-fault threshold standards set forth in Insurance Law § 5102[d], in that, she did not sustain a "serious injury" within the meaning of that law. A& J also contends that it is entitled to contractual indemnification against PCT and that the cross-claims against it for negligence, common law indemnification and contribution, must be dismissed. Lastly, A&J asserts that PCI's cross-claim for fraud must be dismissed.

The plaintiffs oppose A&J's motion arguing that A&J has failed to make a prima facie showing of entitlement to summary judgment. The plaintiffs assert that A&J's physician relies on unsworn MRI reports, which are inadmissible and the physician failed to cite an objective test of the plaintiff's range of motion. The plaintiffs assert that A&J's own doctors are unable to state that Garcin did not suffer a permanent consequential limitation and/or a significant limitation of use of her cervical and thoracic spine. The

[1]A&J failed to provide this Court with a copy of the bill of particulars upon which to determine Garcin's claimed injuries. The Court relied upon the bill of particulars submitted on Graham's motion.

plaintiffs further argue that a question of fact exists as to A&J's liability in leasing a defective crane.

In opposition, PCT argues that A&J's motion must be denied as it fails to present prima facie evidence that it is entitled to summary judgment and its own factual presentation contains material issues of fact. PCT asserts that the rental agreement, which was drafted by A&J, identifies PCI as the lessee and not PCT and nowhere in the agreement does it state that PCT accepted the contractual responsibilities with respect to ownership, operation, direction and control of the crane, Graham's employment or any indemnification obligation to A&J. PCT further argues that there is a question of fact as to whether the contract is enforceable upon PCT, since the testimony from PCT's witnesses makes it clear that Manuel Perez ("Perez"), PCT's on-site foreman, possessed no authority to enter into the agreement on PCT's behalf or bind it to its terms.

PCT further argues that A&J presents no competent evidence to demonstrate that the accident was not proximately caused by a mechanical defect with the crane. PCT also argues that A&J's argument that Scott Graham ("Graham") is a PCT employee is exclusively premised on the Bare Rental Agreement, on which A&J identified PCI as the lessee and bears the signature from an individual who lacked capacity to enter into agreements on PCT's behalf. PCT also contends that an issue of fact exists as to Graham's employer.

In reply to the plaintiffs' opposition, A&J reiterates that Garcin has not sustained a serious injury within the meaning of New York State Insurance Law § 5102. A&J asserts that Garcin's claims that she was horrified and in shock, are inconsistent with her behavior after the incident, as can be seen on the video. A&J asserts that the plaintiffs' physician, Dr. Holstein's recitation of Garcin's history of treatment is inaccurate and unreliable and it would not be unreasonable for other information contained in the report to be unreliable. A&J also asserts that the plaintiffs failed to reveal all of Dr. Holstein's positive findings following the initial examination, including the lumbar spine examination having normal range of motion and that it is inconceivable that at the time of her first visit to Dr. Holstein, immediately following the accident, Garcin's range of motion for her lumbar spine was normal, but over one year later, her range of motion was abnormal.

A&J states that the plaintiffs also rely on a report prepared by Dr. Nason, following an IME of Garcin on March 20, 2016 and only recit those portions of the report that corroborate Garcin's subjective claims of injury, but omit Dr. Nason's conclusion that Garcin used sub optimal effort during the examination. A&J further argue that Dr. Norman Weiss prepared an affirmed report on behalf of workers' compensation on March 13, 2017, and stated that he did not consider Garcin's PTSD to represent psychiatric disability.

A&J contends that the plaintiffs' assertion that Dr. Buckner and Dr. Elkin relied on an unsworn MRI report as a basis for their findings, is speculative and false, because both doctors conducted complete IME's of Garcin. A&J also argues that Dr. Holstein did not

examine Garcin nor provide her with further treatment from January 10, 2017 until September 24, 2019, when counsel needed to bolster the plaintiffs' argument for a serious injury. Further, A&J argues that the accident happened on Friday and Garcin returned to work on Monday and at her first hospital visit, she did not complain of any physical injuries. Also, prior to the accident, Garcin had injured her neck in a motor vehicle accident and at the time of her deposition, she had no future doctor's appointments scheduled for treatment related to her alleged injuries and no longer takes Xanax.

A&J contends that the crane was mechanically sound and the plaintiffs never requested an inspection of the crane prior to the commencement of the action. A&J contends that the DOT report recites that the brakes did appear to actuate/function when breake pedal or parking brake was engaged and when the vehicle was placed into gear with the parking brake engaged, the vehicle did not move.

Discussion

A party seeking summary judgment bears the initial burden of affirmatively demonstrating its entitlement to summary judgment as a matter of law. (*Winegrad v New York Univ. Med. Ctr.,* 64 NY2d 851, 853 [1985]; *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). If a sufficient prima facie showing is made, the burden then shifts to the non-moving party to come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. (CPLR 3212[b]); *see also, Vermette v Kenworth Truck Company*, 68 NY2d 714, 717 [1986]). The parties' competing contentions are viewed in the light most favorable to the party opposing the motion. (*Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.,* 168 AD2d 610 [2d Dept 1990]).

"Because a finding of negligence must be based on the breach of a duty, a threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party" (*see Espinal v Melville Snow Contractors, Inc.*), 98 N.Y.2d 136, 138 [2002]). A&J asserts that it owed no duty to the plaintiffs because it was merely the lessor of the crane, pursuant to an agreement and did not provide labor or supervision for the operation or use of the crane at the job site. However, the Court found that there is an issue of fact as to Graham's employment and A&J provided Graham to PCT to operate the crane. Therefore, if A&J is found to be Graham's employer and Graham was found to be negligent in the operation of the crane, A&J would be vicariously liable to the plaintiffs. Additionally,, A&J provided Graham to operate the crane for PCT and therefore, "impliedly represented that the operator furnished by it would be competent, able and could be trusted to perform the duties called upon him to perform at the job site" (*Carinha v Action Crane Corp.*, 58 AD2d 261 [1st Dept 1977]).

The Court further finds that A&J failed to provide competent evidence that the accident was not caused by a mechanical defect with the crane. A&J did not provide any service records for the crane, nor any documentation of a detailed inspection of the crane both before and after the accident and the Department of Transportation's inspection of

the crane was not found that it was difficult to ascertain if the brakes were out of adjustment or an issue.

With regard to the plaintiff's serious injury;

Insurance Law §5104(a) provides in pertinent part that:

> Notwithstanding any other law, in any action by or on behalf of a covered person against another covered person for personal injuries arising out of negligence in the use of operation of a motor vehicle in this state, there shall be no right to recovery for non-economic loss, except in the case of a serious injury, or for basic economic loss....(McKinney's Insurance Law §5104[a])

Insurance Law §5102(d) defines "serious injury" as

> 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. (McKinney's Insurance Law §5102[d])

"The determination of whether [a] plaintiff sustained a serious injury within the meaning of the statute is, as a rule, a question for the jury." (31 N.Y.Prac., New York Insurance Law § 32:32 [2015-2016 ed.]; *see also*, *Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345 [2002]). "[O]n a motion for summary judgment the defendant has the burden to show that the plaintiff has not sustained a serious injury as a matter of law" (*Id*.).

The degree or seriousness of an injury may be shown in one of two ways: either by an expert's designation of a numeric percentage of a plaintiff's loss of range of motion or by an expert's qualitative assessment of a plaintiff's condition provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 357 [2002]). A defendant can establish that a plaintiff's injuries are not serious within the meaning of New York State Insurance Law § 5102(d), by the submission of an affirmed medical report from a medical expert who has examined the plaintiff and has determined that there are no objective medical findings to

support the plaintiff's alleged claim (*see Rodriguez v Huerfano*, 46 AD3d 794 [2d Dept 2007]).

In this case, the plaintiff did not suffer death, dismemberment, significant disfigurement, fracture or loss of a fetus. Therefore, those categories of the Insurance Law § 5102(d) can be eliminated. Therefore, the plaintiff would be claiming a permanent loss of use of a body organ, member, function or system; a 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 prevented her from performing substantially all of the material acts which constitute her 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 defendants argue that the plaintiff had pre-existing and degenerative injuries not causally related to the bus incident.

A&J submitted an independent medical reports of Ene Elkin, M.D., John H. Buckner, M.D., and Barbara S. Baer, Ph.D., ABPP-CN. Dr. Buckner failed to review Garcin's records, but instead relies on the unsworn reports and interpretations of Garcin's films. Further, his range of motion testing did not provide an objective basis to determine Garcin's range of motion during his physical exam and does not provide the findings for all of the objective testing performed. Further, Dr. Buckner's impression that Garcin has a long history of doctor shopping and somatization, likely indicative of a probable pre-existing and unrelated personality disorder, has no basis, is unsupported and Dr. Buckner does not state how he is qualified to make such a determination as an orthopaedist. Dr. Elkin also relies on the reports and fails to state that he reviewed Garcin's films. Dr. Elkin found cervical spondylosis and found some deficiency in range of motion. Garcin's physician, Dr. Holstein and the bill of particulars, claim that the accident exacerbated Garcin's pre-existing cervical spine conditions and such is evident and confirmed by the objective testing performed. Dr. Holstein opines that, even though Garcin may have spondylosis, it is not the cause of her current symptoms which presented after the accident. The Court finds that A&J has failed to meet its prima facie burden with these doctors.

Dr. Baer summarized that the evaluation suggest that Garcin had a brief period of an acute stress disorder following her accident and was no longer treating with a psychiatrist or other mental health provider. Dr. Baer states that Garcin's current evaluation finds no evidence of current anxiety or depression that is related to the reported crane accident or any other factor. Her fear of cranes is usual and expected, since she was present at the accident and her mild depression is more likely related to the recent death of her friend. Dr. Baer diagnosed Garcin's acute stress disorder as being resolved.

In contrast, Dr. Holstein diagnosed Garcin with PTSD as a result of the accident and provided a detailed analysis of his interview, using the diagnostic criteria outlinied by the DSM and opining that Garcin's complaints meet all eight criteria under the DSM necessary

to make the diagnosis. The Court, therefore, finds that the plaintiffs have created issues of fact with regard to Dr. Baer's report.

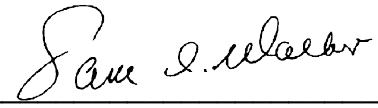
With regard to indemnification claims, the Court denies such claim, since there are issues of fact with regard to fault and the proximate cause of the accident.

Accordingly, based on the foregoing, the Court finds that A&J has failed to establish its prima facie entitlement to summary judgment and it is hereby;

ORDERED that A&J's motion for summary judgment is denied.

The foregoing constitutes the Opinion, Decision and Order of the Court.

Dated: White Plains, New York
May 7, 2020



HON. SAM D. WALKER, J.S.C.