

**Gouvakis v Rambrich**

2021 NY Slip Op 34146(U)

June 2, 2021

Supreme Court, Queens County

Docket Number: Index No. 714954/2017

Judge: Robert J. McDonald

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.

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

ERASMIA GOUVAKIS, ARIETA GOUVAKIS,
EIRINI FRONIMAKSI AND MICHAEL SERPA,

Plaintiffs,

- against -

ROBERT RAMBRICH,

Defendant.

Index No.: 714954/2017

Motion Date: 5/27/21

Motion No.: 16

Motion Seq.: 3

The following electronically filed documents read on this motion by defendant for an order pursuant to CPLR 3212, granting defendant summary judgment and dismissing the first and fourth causes of action in the complaint on the basis that plaintiffs Erasmia Gouvakis and Michael Serpa did not sustain a serious injury within the meaning of Insurance Law §§ 5104(a) and 5102(d):

Notice of Motion-Affirmation-Memo. of Law-Exhibits...EF 44 - 55
Affirmation in Opposition-Exhibits.....EF 57 - 65
Affirmation in Reply.....EF 66

In this negligence action, plaintiff seeks to recover damages for personal injuries allegedly sustained as a result of a motor vehicle accident that occurred on August 4, 2017. As a result of the accident, plaintiff Michael Serpa alleges that he sustained serious injuries to his cervical spine, thoracic spine, and lumbar spine. Plaintiff Erasmia Gouvakis alleges that she sustained serious injuries to her cervical spine, lumbar spine, left shoulder, and right knee.

Plaintiffs commenced this action by filing a summons and complaint on October 26, 2017. Defendant joined issue by service of an answer on December 28, 2017. Defendant now moves for an order pursuant to CPLR 3212, dismissing the complaint on the ground that the injuries claimed fail to satisfy the serious

injury threshold requirement of Section 5102(d) of the Insurance Law. Since the case has now been settled by Erasmia Gouvakis, that branch of the motion shall be denied as moot.

Plaintiff Serpa appeared for an examination before trial on November 1, 2018 and testified that he was involved in the subject accident. His shoulder hit the back of the driver seat. He did not have bleeding, visible bruising or loss of consciousness. He did not experience pain immediately after the accident. He did experience pain the following morning. The first facility he went to for treatment was Mount Sinai Hospital emergency room where he complained of lower back pain. The doctor who saw him at the emergency room stated he most likely had whiplash. He also experienced neck pain. He received physical therapy at Advanced Physical Therapy that included hot pads, electric stimulation, massage, and acupuncture. He stopped going to therapy after four to five months. He resumed going to physical therapy about one month later, and then, went once a week for about two months. He then took a break for two months, and then, restarted. He had an MRI of his lower back. He also treated with Dr. Stanousky. He was confined to bed for four non-consecutive days. No doctor told him not to work.

R. Hillsman, M.D. performed an independent medical examination on plaintiff Serpa on August 5, 2019. Plaintiff Serpa presented with current complaints of neck pain and low back pain. Dr. Hillsman identifies the records reviewed prior to rendering his report. Dr. Hillsman performed range of motion testing with a goniometer and found normal ranges of motion in plaintiff's cervical, thoracic, and lumbar spine. All other objective testing performed was negative. Dr. Hillsman concludes that plaintiff Serpa does not demonstrate any disability.

Defendant contends that the evidence submitted is sufficient to establish, prima facie, that plaintiff Serpa has not sustained an injury which resulted in a significant disfigurement; 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 organ, member, function or system. Defendant also contends that plaintiff Serpa did not sustain a medically determined injury or impairment of a nonpermanent nature which prevented him for not less than 90 days during the immediate 180 days following the occurrence from performing substantially all of his usual daily activities.

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]).

Here, the competent proof submitted by defendant, including the affirmed medical reports of Dr. Hillsman and the deposition testimony that plaintiff was confined to his home for a few days following the accident and was not told not to work by a doctor, is sufficient to meet defendant's prima facie burden by demonstrating that neither plaintiff sustained a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident (see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler, 79 NY2d 955 [1992]; Carballo v Pacheco, 85 AD3d 703 [2d Dept. 2011]; Ranford v Tim's Tree & Lawn Serv., Inc., 71 AD3d 973 [2d Dept. 2010]).

In opposition, plaintiff Serpa submits an affidavit from Antonio Ciccone, D.O. who first examined Serpa on August 31, 2017. Dr. Ciccone performed range of motion testing with a goniometer and found restricted ranges of motion regarding Serpa's cervical spine and lumbar spine. Other objective testing performed was positive.

Reginald Denis, M.D. reviewed the MRI of Serpa's lumbar spine and found, inter alia, multilevel degenerative changes and congenital narrowing of the central canal. Corey Weiner, M.D. reviewed the MRI of Serpa's cervical spine and found straightening of the lordotic curvature indicative of muscular spasm. James R. McCleavey, M.D. reviewed the MRI of Serpa's lumbar spine taken on November 3, 2018 and found disc bulges and herniations.

Louis Obergh, DPT, a physical therapist, submits an affidavit stating that he first examined plaintiff Serpa on August 14, 2017. Range of motion testing with the use of a goniometer revealed restricted range of motion in Serpa's cervical spine and lumbar spine. Physical Therapist Obergh opines that the injuries are directly related to the subject accident.

Stephanie M. Bayner, M.D. submits an affirmation stating that she recently examined Serpa on April 16, 2021. Dr. Bayner

reviewed Serpa's medical records, performed range of motion testing with the use of a goniometer, and found restricted ranges of motion in Serpa's cervical spine and lumbar spine. Other objective testing performed was positive. Dr. Bayner opines that the injuries are causally related to the subject accident. The prognosis regarding full recovery and return to the normal level of functioning in a continuous and pain free environment as was experienced prior to the subject accident is fair to poor. Continued treatment is still required. Serpa's injuries cause continuous limitations to his lifestyle.

In opposition, this Court finds that plaintiff raised triable issues of fact as to whether he sustained a serious injury by submitting the affirmed reports attesting to the fact that plaintiff sustained injuries as a result of the subject accident, finding that plaintiff had significant limitations in ranges of motion both contemporaneous to the accident and in a recent examination, and concluding that the limitations are permanent and causally related to the accident (see Perl v Meher, 18 NY3d 208 [2011]; David v Caceres, 96 AD3d 990 [2d Dept. 2012]; Martin v Portexit Corp., 98 AD3d 63 [1st Dept. 2012]; Ortiz v Zorbas, 62 AD3d 770 [2d Dept. 2009]; Azor v Torado, 59 AD2d 367 [2d Dept. 2009]). Additionally, Dr. Bayner opined that plaintiff sustained causally related injuries which still continue to limit his lifestyle.

Based on the conflicting opinions of experts, and viewing the evidence in the light most favorable to the nonmoving party, issues of fact preclude summary judgment (see Tolpygina v Teper, 44 AD3d 747 [2d Dept. 2007]).

Accordingly, and for the reasons stated above, it is hereby,  
ORDERED, that the motion is denied.

Dated: June 2, 2021  
Long Island City, N.Y.

*Robert J. McDonald*

---

ROBERT J. McDONALD  
J.S.C.