

<b>Guadagno v Rahman</b>
2012 NY Slip Op 30094(U)
January 17, 2012
Supreme Court, Queens County
Docket Number: 16474/09
Judge: Robert J. McDonald
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plaintiffs' vehicle.

The plaintiff commenced this action by filing a summons and complaint on June 22, 2009. Issue was joined by service of defendant's verified answer with counterclaim dated July 24, 2009.

Defendants now move for an order pursuant to CPLR 3212(b), granting summary judgment dismissing each plaintiff's complaint on the ground that neither Luigi Guadagno nor Angelina Guadagno suffered a serious injury as defined by Insurance Law § 5102.

In support of the motion, defendants submit an affirmation from counsel, Joseph G. Gallo, Esq; a copy of the pleadings; each plaintiff's verified bill of particulars; the affirmed medical reports of radiologist Dr. Sondra J. Pfeffer; the affirmed medical reports of Dr. Robert Israel; and a copy of the transcript of the examinations before trial of plaintiff Luigi Guadagno and plaintiff Angelina Guadagno.

In his verified Bill of Particulars, plaintiff, Luigi Guadagno, age 77, states that as a result of the accident he sustained, inter alia, a disc herniation at the C4-C5, C5-C6 and L3-L4 levels and disc bulges at L4-L5 and L5-S1 levels. At the time of the accident, plaintiff was self-employed as a hair dresser. His bill of particulars states that he was confined to his bed and home and totally disabled for one month following the accident. Plaintiff, Angelina Guadagno, age 66, states that she sustained disc bulging at C3-C4, C4-C5, C5-C6, C6-C7, and T3-T4. She states that she was confined to her home and bed and totally disabled for three months immediately following the accident.

Plaintiffs contend that they each sustained a serious injury as defined in Insurance Law § 5102(d) in that they 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 each plaintiff from performing substantially all of the material acts which constitute their 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. Robert Israel, a board certified orthopedic surgeon, retained by the defendants, examined both plaintiffs on July 14, 2010. Luigi Guadagno presented with pain in his neck, upper back,

both shoulders, both hands, and both arms. Dr. Israel performed quantified and comparative range of motion tests. He found that Mr. Guadagno had no limitations of range of motion in the cervical spine and lumbar spine. He concluded that the plaintiff had a resolved sprain of the cervical spine and a resolved sprain of the lumbar spine. He states that based upon his examination, the plaintiff has no disability as a result of the accident in question.

With respect to his examination of Ms. Guadagno, Dr. Israel stated that she presented with pain in her neck, upper back, both shoulders, both elbows, both wrists and both hands. Dr. Israel performed quantified and comparative range of motion tests. He found that Ms. Guadagno had no limitations of range of motion in the cervical spine, thoracic spine and both wrists. He concluded that the plaintiff had a resolved sprain of the cervical spine, resolved sprain of the thoracic spine and a resolved sprain of the right and left wrists. He states that based upon his examination, the plaintiff has no disability as a result of the accident in question.

Dr. Sondra J. Pfeffer, a radiologist reviewed the MRI studies of Angelina Guadagno's cervical spine and found disc bulging at C3-C4, C4-C5, C6-C7 and T3-T4. She states that all of the findings pre-existed the subject accident and there was no evidence of recently sustained trauma related disc or vertebral injury at any cervical level. Dr. Pfeffer also reviewed the MRI studies of Luigi Guadagno's cervical MRI and lumbar MRI and found disc bulging at C3-4, C4-5, C5-6, C6-7, C7-T1, T2-3, T11-12 and several areas of the lumbar spine. Dr. Pfeffer states that all of the findings are either degenerative or pre-existing to the subject accident.

Mr. Guadagno was deposed on June 9, 2010. He states that approximately two weeks after the accident he began a course of physical therapy which lasted several months which ended in 2009 when his no-fault benefits ran out and his private insurance would not pay. Angelina Guadagno testified at her deposition that a few days after the accident she presented to First Med with pain in her neck, head arms and wrists. She was treated with physical therapy for a few months but then stopped. She also testified that she was involved in a subsequent accident on March 19, 2009 in which she also injured her neck.

Defendant's counsel contends that the medical reports of Drs. Israel and Pfeffer as well as the deposition testimony of the plaintiffs are sufficient to establish, prima facie, that each 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 their 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's attorney Frank Trief, Esq., submits his own affirmation; a copy of the transcript of the examination before trial of defendant Mohammed M. Rahman; a copy of the police report (MV-104); a copy of the transcripts of the examinations before trial of plaintiffs; the affirmations of Dr. Jeffrey E. Mallin with respect to each plaintiff; and the affirmations of radiologist Dr. Adam R. Silvers regarding MRI studies of each plaintiff.

Dr. Silvers, a radiologist states in his affirmation that the MRI studies of the plaintiff Mrs. Guadagno indicated slight disc bulging at C3-C4, C4-C5, C5-C6, C6-C7, T3-T4. As to Mr. Guadagno, Dr. Silvers found disc bulging at C3-C4, C4-C5, C5-C6, C6-C7, T2-T3, L3-L4, L4-L5. L5-S1 and disc herniations at C4-C5 and C5-C6, L3-L4.

Dr. Mallin, a board certified neurologist, states that he first examined plaintiff, Angelina Guadagno at First Med on August 24, 2006 for injuries she sustained in her accident of June 24, 2006. He states that at that time of his initial evaluation he believed that Ms. Guadagno experienced a hyperextension/hyperflexion injury at the time of impact. He referred her for MRI studies of her back. He states that she was in continuous treatment at his office through 2009 at which time he determined that she had reached maximum benefit with regard to the treatment being administered and that any further treatment would be palliative. Dr. Mallin re-evaluated the plaintiff on August 9, 2011. He states that examination, "Mrs. Guadagno is still experiencing slightly diminished range of motion of the cervical spine." He concludes that Mrs. Guadagno sustained significant injuries to her neck and back due to the subject accident. He states that the injuries may become permanent.

Dr. Mallin states in his affirmed report dated November 7, 2011 that he first examined Luigi Guadagno on August 24, 2006 for injuries sustained in the accident of June 24, 2006. He states that at that time of his initial evaluation he believed that Mr. Guadagno experienced a cervical

hyperextension/hyperflexion injury at the time of impact. He referred him for MRI studies of his cervical and lumbar spines. He states that he was in continuous treatment at his office through 2009 at which time he determined that he had reached maximum benefit with regard to the treatment being administered and that any further treatment would be palliative. Dr. Mallin re-evaluated Mr. Guadagno on August 9, 2011. He states, based upon that examination, that Mr. Guadagno sustained significant and potentially permanent injuries to his cervical and lumbar spine due to the subject accident.

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]).

Initially, it is defendant's obligation to demonstrate that the plaintiff has not sustained a "serious injury" by submitting affidavits or affirmations of its medical experts who have examined the litigant and have found no objective medical findings which support the plaintiff's claim (see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler, 79 NY2d 955 [1992]). 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]).

Here, the proof submitted by the defendants, including the affirmed medical reports of Drs. Pfeffer and Israel was sufficient to meet its prima facie burden by demonstrating that each plaintiff did not sustain 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]).

In opposition, each plaintiff failed to raise a triable issue of fact (see Zuckerman v City of New York, 49 NY2d 557, [1980]; Cohen v A One Prods., Inc., 34 AD3d 517 006]). The only affirmed medical proof submitted by the plaintiffs were the affirmed reports of Drs. Mallin and Silver. Although Dr. Mallin's report regarding his August 2006 examination was sufficiently contemporaneous with the accident and demonstrated that the plaintiffs each sustained injuries in the accident (see Perl v Meher, 2011 NY Slip Op 8452 [2011]), Dr. Mallin's report regarding his recent examination in August, 2011, did not contain objective range of motion limitations which were compared to normal. Without an affirmed medical report indicating the plaintiff's current physical condition, the plaintiff's submissions were insufficient to raise a triable issue of fact as to whether the plaintiff sustained a serious injury (see Harris v Ariel Transp. Corp., 55 AD3d 323[2d Dept. 2008]; Sullivan v Johnson, 40 AD3d 624 [2d Dept. 2007]; Barrzey v Clarke, 27 AD3d 600 [2d Dept. 2006]; Farozes v Kamran, 22 AD3d 458 [2d Dept. 2005][in order to raise a triable issue of fact the plaintiff was required to come forward with objective medical evidence, based upon a recent examination, to verify his subjective complaints of pain and limitation of motion]; Ali v Vasquez, 19 AD3d 520 [2d Dept. 2005]). Dr Mallin's report failed to show, via objective medical evidence, that the plaintiffs at their recent examination were limited in any capacity (see Valera v Singh, 932 NYS2d 530 [2d Dept. 2011]).

In addition, Ms. Guadagno testified that she was involved in a subsequent accident in which she injured her neck. Her treating physician did not provide evidence ruling out the subsequent accidents as the cause of plaintiff's limitations (see Wallace v Adam Rental Transp., Inc., 68 AD3d 857 [2d Dept. 2009]; Joseph v A & H Livery, 58 AD3d 688 [2d Dept. 2009]; Yun v. Barber, 63 AD3d 1140 [2d Dept. 2009]; Penaloza v Chavez, 48 AD3d 654 [2d Dept. 2008]).

Lastly, the plaintiffs failed to submit competent medical evidence that the injuries allegedly sustained by each of them as a result of the subject accident rendered them unable to perform substantially all of their daily activities for not less than 90 days of the first 180 days following the accident (see Valera v Singh, 932 NYS2d 530 [2d Dept. 2011]; Nieves v Michael, 73 AD3d 716 [2d Dept. 2010]; Joseph v A & H Livery, 58 AD3d 688 [2d Dept. 2009]).

Accordingly, based upon the foregoing, it is hereby

ORDERED, that the defendants' motion for summary judgment is granted and the complaint of plaintiff LUIGI GUADAGNO AND ANGELINA GUADAGNO is dismissed.

The clerk is directed to enter judgment accordingly.

Dated: January 17, 2012  
Long Island City, N.Y.

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