

**Guiteau v Hurst**

2012 NY Slip Op 31226(U)

May 10, 2012

Supreme Court, Suffolk County

Docket Number: 10-24258

Judge: Peter H. Mayer

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 17 - SUFFOLK COUNTY

**PRESENT:**

Hon. PETER H. MAYER  
Justice of the Supreme Court

MOTION DATE 10-21-11  
ADJ. DATE 2-14-12  
Mot. Seq. # 002 - MD

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MIKE GUYTEAU and YVES GUYTEAU,	LAW OFFICE OF CARL P. MALTESE, ESQ.
	Attorney for Plaintiffs
Plaintiffs,	1050 West Jericho Turnpike
	Smithtown, New York 11787
- against -	
EVANGELINE HURST,	RUSSO, APOZNANSKI & TAMBASCO
	Attorney for Defendant
Defendant.	875 Merrick Avenue
	Westbury, New York 11590
-----X	

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendant, dated September 23, 2011, and supporting papers 1-11 (including Memorandum of Law dated \_\_\_\_); (2) Notice of Cross Motion by the , dated , supporting papers; (3) Affirmation in Opposition by the plaintiffs, dated January 31, 2012, and supporting papers 12 -17; (4) Reply Affirmation by the defendant, dated February 6, 2012, and supporting papers 18 - 19; (5) Other \_\_\_\_ (and after hearing counsels' oral arguments in support of and opposed to the motion); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

**ORDERED** that the motion by defendant for an order pursuant to CPLR 3212 granting summary judgment in her favor on the ground that plaintiffs did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) as a result of the subject accident is denied.

This is an action to recover damages for injuries allegedly sustained by plaintiffs on June 7, 2009 at approximately 4 p.m. when the vehicle owned by plaintiff Yves Guiteau and operated by plaintiff Mike Guiteau, in which plaintiff Yves Guiteau was a front seat passenger, was struck in the rear by a vehicle owned and operated by defendant, Evangeline Hurst. The accident occurred on Lakeland Avenue in the Town of Sayville, Suffolk County, New York. At the time of the accident, plaintiff Mike Guiteau was 18 years old and plaintiff Yves Guiteau was 52 years old.

By their bill of particulars, plaintiffs allege that as a result of said accident plaintiff Mike Guiteau sustained serious injuries including a disc herniation at T4-T5, myofascial pain syndrome in the lower back, and right and left knee contusion sprains, and that plaintiff Yves Guiteau sustained serious injuries including C3-4 and C4-5 disc protrusions with encroachment upon subarachnoid space. In addition, plaintiffs allege that plaintiff Mike Guiteau and plaintiff Yves Guiteau were confined to bed for one day, and that plaintiff Mike Guiteau was confined to home for six weeks and plaintiff Yves Guiteau was confined to home for one day. Plaintiffs claim that plaintiff Mike Guiteau was not a student and was not employed at the time of the accident and that plaintiff Yves Guiteau did not miss any time from his employment as a result of the accident. Both plaintiffs seek to recover economic loss in excess of basic economic loss as defined in Insurance Law § 5102 (a).

Plaintiffs also claim that as a result of said accident they sustained injuries under the following categories of serious injury pursuant to Insurance Law § 5102 (d): 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 non-permanent injury or impairment that prevents the performance of substantially all of the material acts of plaintiff's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the accident.

Defendant now moves for summary judgment dismissing the complaint on the ground that plaintiffs did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) as a result of the subject accident. Defendant's submissions in support of the motion include, the pleadings, plaintiffs' bill of particulars, plaintiffs' deposition transcripts, and the affirmed reports of defendant's examining orthopedic surgeon, Raghava R. Polavarapu, M.D., based on his examinations of plaintiffs on July 12, 2011.

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" (*see* Insurance Law § 5102 [d]).

In order to recover under the "permanent loss of use" category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (*Oberly v Bangs Ambulance Inc.*, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories, either objective evidence of the extent, percentage or degree of the limitation or loss of range of motion and its duration based on a recent examination of plaintiff must be provided or there must be a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (*see, Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 746 NYS2d 865 [2000]; *Mejia v DeRose*, 35 AD3d 407, 825 NYS2d 722 [2d Dept 2006]).

On a motion for summary judgment, the defendant has the initial burden of making a prima facie

showing, through the submission of evidence in admissible form, that the injured plaintiff did not sustain a “serious injury” within the meaning of Insurance Law § 5102 (d) (see *Gaddy v Eyley*, 79 NY2d 955, 582 NYS2d 990 [1992]; *Akhtar v Santos*, 57 AD3d 593, 869 NYS2d 220 [2d Dept 2008]). The defendant may satisfy this burden by submitting the plaintiff’s own deposition testimony and the affirmed medical report of the defendant’s own examining physician (see *Moore v Edison*, 25 AD3d 672, 811 NYS2d 724 [2d Dept 2006]; *Farozes v Kamran*, 22 AD3d 458, 802 NYS2d 706 [2d Dept 2005]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]; *Boone v New York City Trans. Auth.*, 263 AD2d 463, 692 NYS2d 731 [2d Dept 1999]).

The deposition testimony of plaintiff Mike Guiteau on June 13, 2011 reveals that at the time of the accident he was operating his father’s pick-up truck, that the impact to the rear of the vehicle was “a hard tap,” and that a few hours after the accident his neck began to hurt and the following day his mid-back and lower back began to hurt. He testified that he first sought medical attention the day after the accident from Dr. Trimboli, a chiropractor, upon observing his sign near plaintiffs’ home. Plaintiff Mike Guiteau also testified that he saw a spine specialist, Dr. Alongi, that he was referred to a pain management specialist, Dr. Kahn, by his attorney, and that his father referred him to another doctor, Dr. Tzou. He stated that he received three injections to his lower back from Dr. Kahn. Plaintiff explained that at the time of the accident he was not attending school and was not working but was actively looking for employment. When asked if there was anything that he could no longer do as a result of the accident, plaintiff Mike Guiteau replied that he could no longer play basketball, sheetrock “around the house,” and play and give piggy-back rides to his brother and sister. He stated that he had no restrictions performing household chores but had restrictions working on his car and changing its oil. Plaintiff Mike Guiteau also stated that other than adjustments, the chiropractor did nothing else for him, and that he was scheduled for an epidural injection by Dr. Tzou. Plaintiff Mike Guiteau added that he currently felt pain in his mid to lower back.

Plaintiff Yves Guiteau testified at his deposition on June 13, 2011 that at the time of the accident his son was driving his pick-up truck and that he was a passenger. In addition, he testified that following the impact his body did not make contact with the interior of the vehicle. Plaintiff Yves Guiteau stated that he first felt pain, in his neck and right shoulder, at around 8 p.m. that evening, and a few days later sought medical attention for said injuries from Dr. Trimboli. He informed that he saw Dr. Trimboli three times a week for a few months, then his visits decreased to twice a week, and that his treatment ended in November or December of 2010. Plaintiff Yves Guiteau indicated that he saw Dr. Alongi probably a month after the accident, and had an MRI of his neck and shoulder. Plaintiff did not seek treatment of his neck and shoulder with any other medical professionals. When asked what activities he could no longer do, plaintiff replied that he could no longer sheetrock or spackle and that he did not play soccer and basketball with his children, which he used to do usually twice a week. Plaintiff further testified that he had no upcoming medical appointments scheduled.

Defendant’s examining orthopedic surgeon, Raghava R. Polavarapu, M.D. (Dr. Polavarapu), indicated by affirmed report dated July 12, 2011 that he examined plaintiff Mike Guiteau on that date, and that plaintiff’s current complaints consisted of pain in the mid-back and in the lower back radiating to the lower extremities. He listed records submitted to him which included a report dated June 10, 2009 by David E. Trimboli, D.C. and an MRI report dated July 23, 2009 of the thoracic spine. Dr. Polavarapu reported his

range of motion testing results. With respect to plaintiff's cervical spine, he reported that plaintiff complained of minimal tenderness to palpation of the cervical paraspinal musculature, but that no muscle spasm was noted, and the following results, flexion to 45 degrees (45 degrees normal), extension to 40 degrees (45 degrees normal), right rotation to 70 degrees (70 degrees normal), left rotation to 70 degrees (70 degrees normal), right lateral flexion to 45 degrees (45 degrees normal), and left lateral flexion to 45 degrees (45 degrees normal). Regarding plaintiff's thoracic spine, he found that there was no paraspinal spasm or tenderness, that lateral bending on the right and left was normal, and that rotation to the right and left was normal. With respect to plaintiff's lumbar spine, Dr. Polavarapu noted minimal tenderness over the paraspinal musculature on palpation but found no spasms and reported flexion 80 degrees (90 degrees normal), extension 25 degrees (30 degrees normal), and right and left lateral bending 30 degrees (30 degrees normal). He conducted a neurological examination of plaintiff's cervical spine and lumbar spine that produced normal results. As for plaintiff's right and left knees, Dr. Polavarapu reported that there was no tenderness to palpation over the anterior, medial or lateral aspect of either knee, that extension was to 0 degrees (0 degrees normal), and flexion was to 135 degrees (135 degrees normal) for both knees, and that test results were negative. In conclusion, Dr. Polavarapu provided a diagnosis of cervical, thoracic and lumbar sprains/strains, resolved and normal examination of the bilateral knees. He opined that there was no evidence of a causally related orthopedic disability and that plaintiff could perform his normal activities of daily living without restrictions or limitations. He also stated that based on the history provided, the examination findings, and submitted records, there was a causal relationship between the subject accident and plaintiff's reported symptoms.

In his affirmed report dated July 12, 2011 based on his examination of plaintiff Yves Guiteau, Dr. Polavarapu stated that plaintiff's current complaints consisted of pain in his neck and right shoulder. He listed submitted records which included an MRI report dated August 5, 2009 of the cervical spine and a chiropractic examination dated June 10, 2009 by David E. Trimboli, D.C. Dr. Polavarapu provided the results of range of motion testing. Regarding plaintiff's cervical spine, he indicated that plaintiff complained of minimal tenderness to palpation of the cervical paraspinal musculature but no muscle spasm, and reported flexion to 40 degrees (45 degrees normal), extension to 40 degrees (45 degrees normal), right rotation to 70 degrees (70 degrees normal), left rotation to 70 degrees (70 degrees normal), right lateral flexion to 45 degrees (45 degrees normal), and left lateral flexion to 45 degrees (45 degrees normal). With respect to the thoracic spine, he found no paraspinal spasm or tenderness, lateral bending on the right and left was normal, and rotation to the right and left was normal. As for the lumbar spine, he reported no spasm or tenderness over the paraspinal musculature on palpation, and flexion 90 degrees (90 degrees normal), extension 30 degrees (30 degrees normal), and right and left lateral bending 30 degrees (30 degrees normal). Dr. Polavarapu also performed a neurological examination of plaintiff's cervical spine and lumbar spine with normal results. The range of motion testing results for plaintiff's right shoulder and left shoulder revealed forward flexion to 170 degrees (180 degrees normal), abduction to 170 degrees (180 degrees normal), external rotation to 40 degrees (50 degrees normal) and normal internal rotation. Regarding plaintiff's shoulders, Dr. Polavarapu did not note any crepitus at the joints nor any impingement sign. His diagnosis was cervical, thoracic and lumbar spine sprain and strain, resolved, and bilateral shoulder sprain, resolved. Dr. Polavarapu opined that there was no evidence of a causally related orthopedic disability and that plaintiff could perform his normal activities of daily living without restriction or limitation. He concluded that based on the history provided, examination findings, and records submitted, there was a causal relationship between the subject accident and plaintiff's reported symptoms.



Guiteau v Hurst  
Index No. 10-24258  
Page No. 5

Here, defendant failed to meet her prima facie burden of showing that plaintiff Mike Guiteau and plaintiff Yves Guiteau did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the subject accident (*see Caracciolo v Elmont Fire Dist.*, \_\_\_ AD3d \_\_\_, 2012 NY Slip Op 02623 [2d Dept 2012]; *Katanov v County of Nassau*, 91 AD3d 723, 936 NYS2d 285 [2d Dept 2012]). The range of motion testing results for plaintiff Mike Guiteau's lumbar spine extension revealed a 16.7 percent restriction raising an issue of fact as to whether plaintiff sustained a significant limitation (*see Negrete v Hernandez*, 2 AD3d 511, 768 NYS2d 231 [2d Dept 2003] [restriction of motion by more than 15 percent raised a triable issue of fact as to the existence of a serious injury]). In addition, the range of motion testing results for plaintiff Yves Guiteau's right shoulder and left shoulder external rotation revealed a 20 percent limitation, which is significant (*see Mazo v Wolofsky*, 9 AD3d 452, 779 NYS2d 921 [2d Dept 2004]). Moreover, defendant's evidentiary submissions demonstrated the existence of a triable issue of fact as to causation (*see Kearney v Garrett*, 92 AD3d 725, 938 NYS2d 349 [2d Dept 2012]).

Inasmuch as defendant failed to meet her prima facie burden, defendant's motion for summary judgment dismissing the complaint is denied, without regard to the sufficiency of the papers submitted by plaintiffs in opposition (*see Scott v Gresio*, 90 AD3d 736, 934 NYS2d 351 [2d Dept 2011]; *Kelly v Ghee*, 87 AD3d 1054, 929 NYS2d 763 [2d Dept 2011]).

Accordingly, the instant motion for summary judgment is denied.

Dated: \_\_\_\_\_

5/2/12

  
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PETER H. MAYER, J.S.C.