

**Goldstein v Larssan**

2011 NY Slip Op 30770(U)

March 21, 2011

Supreme Court, Nassau County

Docket Number: 3928/09

Judge: Antonio I. Brandveen

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**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

Present: **ANTONIO I. BRANDVEEN**  
J. S. C.

LAWRENCE GOLDSTEIN,  
Plaintiff,  
  
- against -  
  
JEFFREY LARSSAN,  
Defendant.

TRIAL / IAS PART 30  
NASSAU COUNTY  
  
Index No. 3928/09  
  
Motion Sequence No. 001

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits .....	<u>1</u>
Answering Affidavits .....	<u>2</u>
Replying Affidavits .....	<u>3</u>
Briefs: Plaintiff's / Petitioner's .....	_____
Defendant's / Respondent's .....	_____

The defendant moves pursuant to CPLR 3212 and Insurance Law Article 51 for summary judgment dismissing the complaint for non-economic loss allegedly resulting from a June 29, 2008 motor vehicle accident on the ground the injuries claimed by the plaintiff do not satisfy the "serious injury" threshold requirement of Insurance Law § 5102 (d), so the plaintiff's claim for non-economic loss is barred by Insurance Law § 5104 (a). The defense attorney points, in an August 27, 2010 affirmation with other papers, to the March 19, 2010 affirmation by Michael J. Katz, M.D., a board certified orthopedic surgeon, and diplomat of the American Board of Forensic Medicine.

Dr. Katz examined the then 66 year old plaintiff on March 19, 2010, and

conducted range of motion tests on him regarding the cervical spine, thoracolumbar spine, both shoulders, arms, wrists and hands. Dr. Katz recorded the measurements of these parts of the defendant's body. Dr. Katz also reviewed a number of relevant records regarding the underlying matter, including but not limited to the initial August 6, 2008 orthopedic examination of the defendant by Salvatore J. Corso, M.D., the August 28, 2008 to December 15, 2008 handwritten examination reports of Bridge Rehabilitation and Musculoskeletal Care, the August 28, 2008 handwritten patient history and information form, the October 27, 2008 and December 8, 2008 handwritten patient health questionnaires, the December 8, 2008 PT/OT patient summary form, the November 28, 2008 examination report of Jay W. Eneman, M.D., the December 5, 2008 followup examination report of Dr. Eneman, and the March 28, 2008 Long Island Rail Road personal action form. Dr. Katz opined the injuries diagnosed in the record were cervical strain with radiculitis, and bilateral shoulder sprain. Dr. Katz found the plaintiff's prognosis is excellent. Dr. Katz stated the plaintiff showed no signs nor symptoms of permanence relative to the musculoskeletal system and relative to the June 29, 2008 motor vehicle accident. Dr. Katz opined the plaintiff was not disabled, and he was capable of gainful employment as a Long Island Rail Road ticket worker. Dr. Katz opined the plaintiff was capable of his daily activities of daily living, and capable of all pre-loss activities. Dr. Katz concluded cervical strain with radiculitis, and bilateral shoulder sprain were resolved.

The defense attorney also points to the plaintiff's February 18, 2010 deposition testimony where the plaintiff admitted he missed no time from work from his injuries. The defense attorney notes the plaintiff admitted he sought medical treatment for his alleged injuries, as well as his current physical condition, and the plaintiff conceded he did not sustain "serious injury" to his shoulders or neck from the June 29, 2008 motor vehicle accident. The defense attorney notes the plaintiff did not go to the hospital, but drove his car home from it without bleeding, bruises nor losing consciousness. The defense attorney asserts the plaintiff testified he sought medical treatment for right shoulder pain a week later at his family physician, and adds the plaintiff saw another physician who gave him a muscle relaxant two weeks after the accident, and referred the plaintiff to Dr. Corso for physical therapy. The defense attorney points to a July 7, 2008 right shoulder x-ray by George Cavaliere, M.D., a radiologist at Island Diagnostic Imaging Associates. Dr. Cavaliere found no evidence of fracture nor dislocation, but anatomic or degenerative development not attributable to any trauma sustained in the June 29, 2008 motor vehicle accident.

In opposition, the plaintiff's attorney states, in a December 21, 2010 affirmation with other papers, the defendant failed to establish a *prima facie* entitlement to summary judgment because the defense does not refute the "serious injury" allegations. The plaintiff's attorney asserts the plaintiff's admissible sworn orthopedic medical reports from a recent examination are based upon objective findings relating to permanent

traumatic cervical and shoulder injuries respect to the June 29, 2008 motor vehicle accident. The plaintiff's attorney contends this showing established a triable issue of fact with respect to "serious injury." The plaintiff's attorney points to the plaintiff's February 18, 2010 deposition testimony about the accident impact on the plaintiff's life, and adds the plaintiff was unable to perform substantially all of his usual and customary activities for more than 90 out of 180 days following the accident. The plaintiff's attorney also notes the September 11, 2009 verified bill of particulars alleges specific injuries to the plaintiff's both shoulders, severe cervical sprain with cervical-radiculopathy with pain radiating down the upper extremities and peroration, and other related injuries.

Dr. Eneman, a board certified orthopedic surgeon, the plaintiff's treating physician states, in a December 21, 2010 affirmation, he treated the plaintiff at Bridge Rehabilitation and Musculoskeletal Care for the injuries sustained from the June 29, 2008 motor vehicle accident. Dr. Eneman stated the plaintiff first presented at his office on August 26, 2008 until December 13, 2008 requesting a second opinion after treatment with Dr. Rachlin from July 7, 2008 to July 17, 2008, and then the defendant went for treatment at Orthopedic & Sports Associates on August 6, 2008. Dr. Eneman stated the range of motion tests performed and the measurements he made with respect to the plaintiff on August 26, 2008. Dr. Eneman stated the range of motion tests performed and the measurements he made with respect to the plaintiff in November 2010. Dr. Eneman states, as a result of the accident, the plaintiff was unable to perform many of his usual

and customary activities, including bending, lifting and stretching exercises. Dr. Eneman states no-fault insurance was cut off on December 13, 2008, and it was determined any further treatment would be palliative. Dr. Eneman opined the plaintiff sustained traumatic injuries to the neck, left shoulder and right shoulder, specifically cervical radiculopathy, significant internal derangement of the right shoulder and internal derangement of the left shoulder. Dr. Eneman noted the injuries to the plaintiff's cervical spine and right shoulder may have been pre-existing but were exacerbated by the traumatic insult of the motor vehicle accident. Dr. Eneman opined the left shoulder injury was a direct result of the June 29, 2008 motor vehicle accident. Dr. Eneman opines the plaintiff is partially permanently disabled and unable to perform substantially all of his usual and customary activities for more than 90 days out of 180 days following the June 29, 2008 motor vehicle accident. Dr. Eneman opined the plaintiff has chronic cervical syndrome and shoulder syndrome, and the plaintiff will continue to have symptomology and exacerbation. Dr. Eneman opined the plaintiff will continue to have arthritic and degenerative changes to his cervical spine and left and right shoulders with a guarded prognosis that will require therapeutic treatment could only be palliative. Dr. Eneman opined the plaintiff's injuries were caused by the June 29, 2008 motor vehicle accident or significantly exacerbated by the traumatic insult.

The defense attorney replies, in a January 3, 2011 affirmation, the plaintiff relies upon inadmissible medical records which may not be considered in the plaintiff's

opposing papers. The defense attorney states the plaintiff failed to show proof of any contemporaneous range of motion limitations, and adds the plaintiff's doctors ignored the findings of the plaintiff's radiologist that the plaintiff suffers from degenerative changes in his right shoulder. The defense attorney states the plaintiff failed to show competent medical proof of a disability, to wit an inability to perform substantially all of his usual and customary activities for more than 90 days out of 180 days following the June 29, 2008 motor vehicle accident. The defense attorney notes Dr. Eneman did not indicate how the plaintiff's job duties were adversely affected nor how often the plaintiff would bowl before the June 29, 2008 motor vehicle accident nor are there any claims bowling comprised the majority of the plaintiff's daily activities. The defense attorney avers Dr. Eneman did not examine the plaintiff until two months after the June 29, 2008 motor vehicle accident. The defense attorney contends Dr. Eneman fails to note Dr. Cavaliere's x-ray report which revealed calcific tendinitis in the plaintiff's right shoulder, and Dr. Eneman does not reconcile his attempt to causally relate the limitations to Dr. Cavaliere's findings. The defense attorney maintains the failure to address the degenerative changes defeats the plaintiff's claim of a "serious injury."

This Court carefully reviewed and considered all of the papers submitted by the parties with respect to this motion. Here, the defense met the *prima facie* burden of showing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the June 29, 2008 motor vehicle accident (*see Toure v. Avis*

*Rent A Car Sys.*, 98 N.Y.2d 345, 746 N.Y.S.2d 865, 774 N.E.2d 1197; *Gaddy v. Eyley*, 79 N.Y.2d 955, 956-957, 582 N.Y.S.2d 990, 591 N.E.2d 1176).

In opposition, the plaintiff's attorney submitted the plaintiff's affidavit among other papers. The Second Department holds a plaintiff's self-serving affidavit is insufficient to raise a triable issue of fact as to whether the plaintiff sustained a serious injury in the absence of any admissible objective evidence of injury (*see Felix v. New York City Transit Authority*, 32 A.D.3d 527, 819 N.Y.S.2d 835 [2<sup>nd</sup> Dept, 2006]).

The Second Department also held in another analogous case: To establish that she sustained an injury that falls within either of these categories of serious injury, the plaintiff was required to show the duration of the alleged injury and the extent or degree of the limitations associated therewith (*see Lee v. Fischer*, 244 A.D.2d 389, 664 N.Y.S.2d 452; *Beckett v. Conte*, 176 A.D.2d 774, 575 N.Y.S.2d 102). While the plaintiff submitted evidence of a recent examination in which significant limitations in cervical and lumbar ranges of motion were noted by her treating osteopath, she failed to proffer competent medical evidence of any range-of-motion limitations in her spine that were contemporaneous with the subject accident (*see D'Onofrio v. Floton, Inc.*, 45 A.D.3d 525, 845 N.Y.S.2d 421; *Morales v. Daves*, 43 A.D.3d 1118, 841 N.Y.S.2d 793; *Rodriguez v. Cesar*, 40 A.D.3d 731, 835 N.Y.S.2d 438; *Borgella v. D & L Taxi Corp.*, 38 A.D.3d 701, 834 N.Y.S.2d 199). Thus, in the absence of contemporaneous findings of range-of-motion limitations in her spine, the plaintiff was unable to establish the duration of the injury *Ferraro v. Ridge Car Service*, 49 A.D.3d 498, 854 N.Y.S.2d 408 [2<sup>nd</sup> Dept, 2008].

Here, Dr. Katz performed quantified range of motion test on this plaintiff's cervical spine, left shoulder and right shoulder using a goniometer. Dr. Katz compared his findings to normal range of motion values, and concluded the ranges of motion measured were normal. Dr. Katz performed other clinical tests, and found no motor nor sensory deficits,



deep tendon reflexes symmetric bilaterally. Dr. Katz diagnosed the plaintiff with resolved strains of the cervical spine and bilateral shoulders with no residual limitations nor disability based on Dr. Katz's clinical findings and medical records review. In opposition, the only medical showing in admissible form provided by the plaintiff, to wit Dr. Eneman's report. But, Dr. Eneman fails to note Dr. Cavaliere's x-ray report which revealed calcific tendinitis in the plaintiff's right shoulder, and Dr. Eneman does not reconcile his attempt to causally relate the limitations to Dr. Cavaliere's findings. Hence, the plaintiff fails to show any evidence of "serious injury" to the plaintiff's right shoulder.

The Second Department held in an analogous case:

The defendants established, *prima facie*, that neither plaintiff sustained a serious injury within the meaning of Insurance Law § 5102(d) (*see Toure v. Avis Rent A Car Sys.*, 98 N.Y.2d 345, 746 N.Y.S.2d 865, 774 N.E.2d 1197; *Gaddy v. Eycler*, 79 N.Y.2d 955, 582 N.Y.S.2d 990, 591 N.E.2d 1176). At his deposition, the plaintiff Francisco Sierra acknowledged that he missed approximately two or three days of work during the month following the subject motor vehicle accident and that there was no period of time when he could not work at all as a result of the accident (*see Morris v. Edmond*, 48 A.D.3d 432, 850 N.Y.S.2d 641). The plaintiff Julia Sierra's deposition showed that she was not confined to her bed for any length of time as a result of the accident

*Sierra v. Gonzalez First Limo*, 71 A.D.3d 864, 895 N.Y.S.2d 863 [2<sup>nd</sup> Dept, 2010].

The plaintiff admitted he missed minimal time from work during the month following the accident as a result of his injuries from the June 29, 2008 motor vehicle accident. There is no time when the plaintiff could not work as a result of the June 29, 2008 motor vehicle accident. In opposition, the plaintiff failed to submit competent medical evidence that he was unable to perform substantially all of his daily activities for not less than 90 of the

first 180 days subsequent to the subject accident (*see Sainte-Aime v. Ho*, 274 A.D.2d 569, 712 N.Y.S.2d 133 [2<sup>nd</sup> Dept, 2000]). Neither the plaintiff nor Dr. Eneman specified the extent or degree of the purported limitations, nor satisfy the “serious injury” threshold requirement of Insurance Law § 5102 (d). There is only a statements about the plaintiff not bowling.

Accordingly, the motion is granted in accord with this decision and order of the Court. The Court awards summary judgment to the defendant pursuant to CPLR 3212 and Insurance Law Article 51 with respect to the plaintiff’s right shoulder claim, and for summary judgment for non-economic loss allegedly resulting from a June 29, 2008 motor vehicle accident on the ground the injuries claimed by the plaintiff do not satisfy the “serious injury” threshold requirement of Insurance Law § 5102 (d), so the plaintiff’s claim as to the right shoulder and for non-economic loss are barred by Insurance Law § 5104 (a).

So ordered.

Dated: **March 21, 2011**

ENTER:



J. S. C.

**ENTERED**

FINAL DISPOSITION

NON FINAL DISPOSITION ~~XXX~~

MAR 23 2011