

Pallis v Bacon

2007 NY Slip Op 30710(U)

April 13, 2007

Supreme Court, Queens County

Docket Number: 0006846/2005

Judge: David Elliot

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT IAS PART 14
Justice

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TAMMY PALLIS,	No. 6846/05
Plaintiff,	Motion
-against-	Date January 23, 2007
JEAN D. BACON,	Motion
Defendant.	Cal. No. 18
-----	Motion
	Seq. No. 2

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Plaintiff commenced this action seeking to recover damages for personal injuries alleged to have been sustained in a two car motor vehicle accident which occurred on February 23, 2004 at the intersection of Queens Boulevard and 71st Road, in the County of Queens, City and State of New York.

Defendant Jean D. Bacon moves for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury pursuant to Insurance Law §§ 5102(d) and 5104(a).

Contentions of the Parties

Defendant submits the plaintiff's bill of particulars which sets forth the following injuries: reversal of the normal cervical lordotic curvature system with muscle spasm; disc bulge at L5-S1 impinging upon the thecal sac; bilateral L5-S1 radiculitis; shoulder depression on the left radiating into the shoulders; limited range of motion of the cervical spine; limited range of motion of the lumbar spine; and

headaches. Defendant asserts that on the date of the accident, plaintiff was transported to St. John's Hospital where she was treated and released with the diagnosis of myalgia, that is, diffuse muscle pain. No x-rays or other diagnostic tests were performed. Her chief complaint was pain to her arms and back. Plaintiff received treatment at two adjacent offices, to wit, Royal Medical and Village Chiropractic. At Royal Medical, she received hot and cold packs, ultrasound and electrical muscle stimulation on 42 occasions between February 24, 2004 and August 6, 2004. She was seen only 4 times in June, 2 times in July and 1 time in August. At Village Chiropractic, plaintiff received 43 chiropractic manipulations during that time and was seen 4 times in June and 2 times each in July and August.

Defendant asserts that on March 12 and March 15, 2004, plaintiff underwent a cervical spine MRI and Lumbar spine MRI respectively which were performed by Dr. Charles Barax. His report lists reversal of the normal cervical lordotic curvature consistent with mild spasm or pain with respect to the cervical spine and disc bulge at L5-S1 impinging upon the thecal sac as to the lumbar spine. On April 16, 2004 EMG/NCV nerve study tests were conducted by a neurologist who diagnosed cervical and lumbar spine sprain and strains syndrome and bilateral lumbar radiculitis.

Defendant asserts that plaintiff did not sustain a serious injury as there is no objective evidence to support such a finding. Her medical records do not include any findings or limitations resulting from her alleged cervical or lumbar spine injuries and do not indicate the degree or duration of any alleged limitation. Sprains and strains with minimal limitation do not qualify. Plaintiff has not had any further treatment since August 2004 according to her deposition testimony. Plaintiff returned to work only 3 weeks after the accident and had returned to her usual regular duties within 2 months of the accident.

Plaintiff was examined by defendant's doctor Daniel Feuer, a neurologist. He reported all normal ranges of motion with respect to the plaintiff's cervical and lumbar spine. He concluded that plaintiff did not show any objective neurological disability or permanency causally related to the accident. In addition, plaintiff was examined by Dr. Edward A. Toriello, an orthopedic surgeon. His affirmed report states that plaintiff has full range of motion in the cervical and lumbosacral spine, right and left shoulders and the right and left knee. Test results were in

normal ranges or negative. He states that plaintiff has no objective evidence of an ongoing orthopedic permanent disability and is able to work and perform her usual activities of daily living without orthopedic limitations.

Plaintiff opposes the motion. Her deposition testimony shows that she experienced pain in her neck, back and left knee immediately after the accident. She complained about such to the EMS and in the emergency room at St. John's Queens Hospital. Her condition worsened after being discharged and she sought medical attention and treatment at Royal Medical and Village Chiropractic.

Plaintiff submits the affirmed report of Dr. Matthew Miller of Royal Medical. He found muscle spasm and tenderness in the spine and positive shoulder depression on the left for pain radiating into the shoulders, maximum cervical compression tests bilaterally with pain radiating down into the upper back, Kemps test positive bilaterally with tenderness to palpation of the left knee with range of motion within normal limits. He states that all of the injuries and limitations are causally related to the subject accident. He diagnosed her with a permanent partial disability.

In addition, plaintiff submits the affidavit of Richard Amato, a chiropractor for Village Chiropractic. He performed computerized range of motion studies of plaintiff's cervical and lumbar spine and found a 14% whole person impairment, 7% impairment of the cervical spine and 8% impairment of the lumbar spine. Numerous objective tests were positive and, based thereon, he found that her condition was permanent, was causally related to the accident and will require additional treatment and/or therapy to reduce her pain and to prevent her condition from worsening. Plaintiff submits her affidavit with respect to the symptoms she continues to experience and their impact on her normal daily activities.

Decision of the Court

The motion by defendant is denied.

"A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, producing sufficient evidence to demonstrate the absence of any material issue of fact. Once this showing has been made,

the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution." Giuffrida v. Citibank, 100 NY2d 72 at 81.

In the instant case, defendant has established his entitlement to judgment as a matter of law. Defendant has submitted affirmed reports of his examining doctors which support his claim that plaintiff did not sustain a serious injury as required under Insurance Law Article 51. Specific tests are set forth with quantified findings showing no loss of range of motion.

The burden then shifted to plaintiff to raise a triable issue of material fact which would warrant denial of the motion. Plaintiff's medical evidence is sufficient to sustain her burden. Plaintiff's chiropractor's affidavit sets forth the many objective tests performed and the results thereof. His computerized tests reveal specific impairments in the range of motion of the cervical and lumbar spine. He diagnoses that she has sustained a permanent partial disability resulting from the subject accident.

Accordingly, the motion by defendant is denied.

Dated: April 6, 2007

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HON. DAVID ELLIOT