

Ziviello v O'Boyle

2007 NY Slip Op 31319(U)

May 17, 2007

Supreme Court, Suffolk County

Docket Number: 0001229/2005

Judge: Thomas F. Whelan

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 9/15/06
ADJ. DATES 2/2/07
Mot. Seq. # 002 - MD
Mot. Seq. # 003 - MG

-----X		
LAUREL ZIVIELLO and CHARLES ZIVIELLO,	:	SIBEN & SIBEN, LLP
	:	Attys. For Plaintiff
Plaintiffs,	:	90 E. Main St.
	:	Bay Shore, NY 11706
-against-	:	
	:	DESENA & SWEENEY, LLP
JOSEPH G. O'BOYLE and JOHN T. O'BOYLE,	:	Attys. For Defendants
	:	1383-32 Veterans Memorial Hwy.
Defendants.	:	Hauppauge, NY 11788
-----X		

Upon the following papers numbered 1 to 17 read on these motions for summary judgment and to consolidate
_____; Notices of Motion/Order to Show Cause and supporting papers 1-3; 4-6; Notice
of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 7-9; 10-11
_____; Replying Affidavits and supporting papers 12-13; 14-15; Other 16-17; (~~and after hearing~~
~~counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (#002) by defendants, Joseph G. O'Boyle and John T. O'Boyle, for an Order granting them summary judgment pursuant to CPLR 3212 on the grounds that plaintiff, Laurel Ziviello, failed to sustain a "serious injury" within the meaning of New York State Insurance Law §§ 5102(d) and 5104(a), is denied; and it is further

ORDERED that the cross motion (#003) by the plaintiffs for an Order pursuant to CPLR 602 consolidating this action with an action entitled **Laurel Ziviello and Charles Zivello v Brett A. Punzi Contr. Corp. and Ernesto Gomez** bearing Suffolk County Index No. 18079/2005, for joint trial, is granted; and it is further

ORDERED that the consolidated actions shall bear the caption of the two actions, under Suffolk County Index No. 1229/2005, and all documents submitted to the Court and correspondence concerning this matter shall reflect the joint status of these actions; and it is further

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ORDERED that all matters of trial practice are reserved to the Justice presiding at the Trial of these consolidated actions for joint trial; and it is further

ORDERED that all parties shall serve upon any party so demanding copies of all disclosure documents heretofore obtained in each action; and it is further

ORDERED that the pleadings in each of these actions consolidated herein for joint trial shall stand as the pleadings in the consolidated action and each action shall keep its separate identity; and it is further

ORDERED that upon completion of discovery, separate Notes of Issue and Certificates of Readiness as to each action shall be served and filed and each party shall be entitled to enter separate Judgments and Bills of Costs and Disbursements in each action respectively, if costs are allowed; and it is further

ORDERED that counsel for plaintiffs herein is directed to serve a copy of this Order with Notice of Entry upon respective counsel in each action pursuant to CPLR 2103(b)(1), (2) or (3) within thirty (30) days of the date herein and thereafter file the affidavits of service with the Clerk of the Court; and it is further

ORDERED that counsel for plaintiffs herein is directed to serve a copy of this Order upon the Calendar Clerks of this IAS Part 33 and IAS Part 43 (Justice Pitts) and thereafter file the affidavits of service with the Clerk of the Court; and it is further

ORDERED that a compliance conference of these joined civil actions shall be held on **July 18, 2007** in Part 33, at the courthouse located at 1 Court Street, Riverhead, New York and all other previous conferences scheduled in each action, are cancelled.

Defendants in the above action (Index No. 01229/05) move for summary judgment pursuant to CPLR 3212 on the issue that plaintiff, Laurel Ziviello (hereinafter "Ziviello") has not sustained a serious injury pursuant to Insurance Law §§ 5102(d) and 5104(a). Defendants are in compliance with CPLR 3212(b).

In support of their motion, defendants submit the examinations before trial of both plaintiffs, plaintiff's verified Bill of Particulars and copies of the medical records of Ziviello's treating physicians. Also submitted were the affirmed reports of Arthur M. Bernhang, M.D., who examined Ziviello on May 30, 2006 and the affirmed medical report of Richard A. Pearl, M.D., dated May 10, 2006 and the unaffirmed report of David H. Goldstein, M.D. dated November 2, 2004 who examined Ziviello on behalf of the defendants.

Although the report of David J. Stern, D.C, P.T. who treated Ziviello on September 8, 2004 notes plaintiff's range of motion deficits, he did not set forth any objective tests performed by him to ascertain the deficits nor the standards of measurement. Further, although Dr. Goldstein states in his report that he found

full range of motion in plaintiff's cervical spine, he too did not specify the objective medical tests he performed to support his conclusion (*see Russo v Ross*, 32 AD3d 386, 821 NYS2d 101 [2d Dept 2006]; *Tolochchev v Bajrovic*, 28 AD3d 473, 811 NYS2d 785 [2d Dept 2006]; *Ilardo v New York City Tr. Auth.*, 28 AD3d 610, 814 NYS2d 201 [2d Dept 2006]; *Gardner v Paragon Mfg. (USA LTD)*, 15 AD3d 619, 781 NYS2d 580 [2d Dept 2005]; *Korpalski v Lau*, 17 AD3d 536, 793 NYS2d 195 [2d Dept 2005]). Dr. Goldstein also notes restricted range of motion in Ziviello's thoracic and lumbar spine and difficulty in straight leg raising at 20 to 30 degrees. In his report, Dr. Goldstein states that "according to the information provided, review of medical records and my examination findings, it is my opinion that the accident reported on the above mentioned date has a casual relationship to the signs and symptoms described" and that Ziviello has a moderate disability and is unable to return to work in her usual and expected capacity at the time.

Dr. Bernhang states that he found Ziviello to have a decreased range of motion in her cervical spine as tested by a goniometer from the average range which he listed; that Spurling's test for cervical radiculopathy is questionable to the right fourth and fifth fingers; that the lumbar spine disc bulges and degenerative changes indicated on the August 30, 2004 MRI are indicative of degenerative disc disease, which denote arthritic changes and pre-existed the accident; that Ziviello has decreased lumbar expansion of 2' with her knees extended, with 4 being normal; that supine straight leg-raising is 40/60, with 55 and above being normal, which is inconsistent with his findings of a normal range of motion when Ziviello performed this test in a sitting position; that he refers to an MRI report, dated May 28, 2005, wherein he notes that the report indicates a small left parasagittal disc herniation at the L2-L3 level with mid impingement upon the thecal sac, which is new as compared to a prior MRI study of August 24, 2004; that there is a very small left foraminal disc herniation at the L5-S1 which is similar to the prior study; and that he found it "difficult to ascertain which injuries were caused by the motor vehicle accident of August 16, 2004 and the subsequent injury of November 3, 2004.

Dr. Ekstrom notes that Ziviello was recovering from injuries of August 17, 2004 accident and the accident of November 3, 2004; that she had dull throbbing pains in her neck and back; that the evidence of the MRI of the lumbar spine indicates a new herniated disc at L2-3; that Ziviello's complaints on the date of his examination appear to be those related to the accident of November 2, 2004 and not to the injuries sustained in the accident of August 16, 2004; that Ziviello has a moderate disability to her left sided sciatica; and that her prognosis is guarded.

Dr. Pearl also found that Ziviello had decreased cervical range of motion in her cervical spine when compared to the normal range; that he found decreased range of motion in her lumbar spine when compared to the normal range; that Ziviello sustained a cervical dorsal and lumbar sacral strain; that there was no objective findings to indicate neurological injury or neurological disability; that there are no objective findings to correlate with any alleged findings on testing; that Ziviello had a subsequent motor vehicle accident in which she sustained a significant injury of the lumbar spine and he suggested a review of the MRI films by

board-certified neuroradiologist.

Having stated in his affirmation that Ziviello's complaints on the date of his examination in 2006 appear to be those related to the accident of November 2, 2004 rather than the accident of August 16, 2004, Dr. Bernhang has raised a question of fact as to whether the August, 2004 injuries or the November, 2004 injuries are the source of plaintiff's present medical condition and mandates a denial of the motion for summary judgment (*see Rotuba Extruders v Ceppos*, 46 NY2d 228, 413 NYS2d 141 [1978]).

Furthermore, neither Dr. Bernhang nor Dr. Pearl referred to the report of Dr. Goldstein, who found Ziviello's disability to be the result of the August 16, 2004 accident. Therefore, Dr. Goldstein having found that Ziviello was disabled during the first ninety days after the accident, also raises a triable issue of fact as to whether Ziviello suffered a qualifying injury under the 90/180 category (*see Downs v Kehoe*, ___ AD3d ___, ___ NYS2d ___ [4th Dept 2007]; *cf. Yoonessi v Givens*, ___ AD3d ___, ___ NYS2d ___ [4th Dept 2007]). Also, neither physician addressed the medical records of Michael O. Sauter, M.D., one of Ziviello's treating physicians, who had determined that Ziviello was totally disabled during the time period and beyond and could not work, thereby again raising a triable issue of fact (*see Downs v Kehoe*, ___ AD3d ___, *supra*).

Defendants having failed "to establish a prima facie entitlement to judgment as a matter of law, it is unnecessary to reach the question of whether the plaintiff's papers were sufficient to raise a triable issue of fact" (*Chicas v Catalano*, ___ AD3d ___, ___ NYS2d ___ [2d Dept 2007] *citation omitted*); *see also Abreu v City of New York*, ___ AD2d ___, ___ NYS2d ___ [2d Dept 2007]; *Vialva v McMillan*, 31 AD3d 536, 817 NYS2d 519 [2d Dept 2006]; *Welch v Penske Truck Leasing Corp.*, 29 AD3d 783, 815 NYS2d 657 [2d Dept 2006]; *Nembhard v Delatore*, 16 AD3d 390, 791 NYS2d 144 [2d Dept 2005]; *Chapin v Taylor*, 273 AD2d 188, 708 NYS2d 465 [2d Dept 2000]; *Mariac-Olmos v Mizrhy*, 226 AD2d 437, 640 NYS2d 604 [2d Dept 1996]).

Plaintiffs move to consolidate this action with an action entitled ***Laurel Ziviello and Charles Ziviello v Brett A. Punzi Contr. Corp. and Ernesto Gomez***, bearing Suffolk County Index No. 18079/05. Defendants herein oppose the motion as the actions arise from separate automobile accidents which occurred on August 16, 2004 and November 3, 2004, respectively. In support of the motion, plaintiffs submit copies of the pleadings and her Bill of Particulars.

Where it is feasible, a joint trial should be held when the consolidation would be more economical in the use of judicial resources (*see Williams v Mascitti*, 71 AD2d 813, 419 NYS2d 404 [4th Dept 1979]). Generally, a joint trial is favored where the actions share common questions of fact and law (*see CPLR 602[a]*; *McDutchess Bldrs., Inc. v Dutchess Knolls, Inc.* 244 AD2d 534, 665 NYS2d 579 [2d Dept 1997]). Upon motion, the power to order a joint trial rests in the sound discretion of the court where common questions of

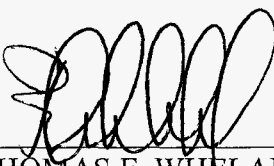
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law or fact exist, absent prejudice to a substantial right of the opposing party (*see D'Abreau v American Bankers Inc. Co. of Florida*, 261 AD2d 501, 690 NYS2d 655 [2d Dept 1999]; *Reckson v Blasland, Bouck & Lee*, 230 AD2d 723, 645 NYS2d 873 [2d Dept 1996]; *Strausser v Neuringer*, 137 AD2d 750, 524 NYS2d 830 [2d Dept 1988]). The actions "present a common issue of fact (CPLR 602 [a]), i.e., the extent to which plaintiff's injuries were caused by the negligence of the defendants in each case" (*Megyesi v Automotive Rentals Inc.*, 115 AD2d 596, 496 NYS2d 473 [2d Dept 1985]; *see also Guasconi v Pohl*, 2 AD3d 1202, 770 NYS2d 203 [3d Dept 2003]; *Melendez v Presto Leasing*, 161 AD2d 501, 555 NYS2d 771 [1st Dept 1990]). In her bill of particulars in the second action (*Ziviello v Brett A. Punzi Contr. Corp. and Gomez*), Ziviello claims aggravation and /or exacerbation of injuries complained of in this action (*see Romandetti v County of Orange*, 289 AD2d 386, 734 NYS2d 629 [2d Dept 2001]; *Heck v Waldbaum's Supermarkets Inc.*, 134 AD2d 568, 521 NYS2d 468 [2d Dept 1987]).

Defendants in this action have failed to demonstrate any prejudice to a substantial right (*compare Glussi v Fortune Brands, Inc.*, 276 AD2d 586, 714 NYS2d 516 [2d Dept 2000]; *Stephens v Allstate Ins. Co.*, 185 AD2d 338, 586 NYS2d 305 [2d Dept 1992]) and the defendants in the second action have failed to submit any opposition to the motion to consolidate. Lack of opposition is tantamount to consent (*see Tortorello v Larry M. Carlin*, 260 AD2d 201, 688 NYS2d 641 [1st Dept 1999]).

Accordingly, defendants' motion for summary judgment is denied and plaintiffs' motion to consolidate this action and a second action, is granted. This constitutes the Order and decision of the Court.

DATED: 3/17/07



THOMAS F. WHELAN, J.S.C.