

Castro v Shaver

2007 NY Slip Op 32171(U)

July 17, 2007

Supreme Court, Suffolk County

Docket Number: 0000171/2004

Judge: Robert W. Doyle

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SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 3-21-07
ADJ. DATE 5-9-07
Mot. Seq. # 001 - MG; CASEDISP

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CRYSTAL CASTRO and VICTORIA CASTRO,	:	KENNETH M. MOLLINS, P.C.	
	:	Attorneys for Plaintiffs	
Plaintiffs,	:	425 Broad Hollow Road, Suite 215	
	:	Melville, New York 11747	
- against -	:		
	:	SHAYNE, DACHS, STANISCI, et al.	
CHRISTOPHER SHAVER and CARRIEANNE	:	Attorneys for Defendants	
SHAVER,	:	250 Old Country Road	
Defendants.	:	Mineola, New York 11501	
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Upon the following papers numbered 1 to 37 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 17; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 18 -33; Replying Affidavits and supporting papers 34 - 37; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendants for an order pursuant to CPLR 3212 granting summary judgment in their favor dismissing the complaint on the grounds that plaintiffs did not sustain a “serious injury” as defined in Insurance Law § 5102 (d) is granted.

This is an action to recover damages for injuries allegedly sustained by plaintiff as a result of a rear end motor vehicle accident that occurred on August 14, 2003 during a black out when the vehicle operated by the then 19 year old plaintiff Crystal Castro, in which her then 18 year old sister plaintiff Victoria Castro was a passenger, was struck by a vehicle owned by defendant Christopher Shaver and operated by defendant Carrieanne Shaver on Connetquot Avenue at or near its intersection with East Roslyn Street in Islip Terrace, New York. By their bill of particulars, plaintiffs allege that as a result of the subject accident each sustained serious injuries.

Plaintiff Crystal Castro allegedly sustained a disc herniation at C6-C7; cervical sprain and strain; cervical radiculopathy; restriction of motion of the cervical spine; lumbar and lumbosacral sprain and strain; lumbar radiculopathy; restriction of motion of the lumbar and lumbosacral spine; thoracic derangement; restriction of motion of the thoracic spine; right shoulder contusion; and restriction of motion of the right shoulder.

Plaintiff Victoria Castro allegedly suffered a fracture of the left wrist; restriction of use of the left wrist; disc herniation at C5-C6; disc bulge at C6-C7; cervical sprain and strain; cervical radiculopathy; restriction of motion of the cervical spine; lumbar and lumbosacral sprain and strain; lumbar radiculopathy; restriction of motion of the lumbar and lumbosacral spine; thoracic sprain and strain; and restriction of motion of the thoracic spine.

In addition, plaintiffs allege that following the accident, they were both treated then released from Southside Hospital's emergency room the same day and then confined to bed for about seven days. Plaintiff Crystal Castro allegedly was confined to her home for approximately three weeks whereas plaintiff Victoria Castro was confined to her home for about seven days. Plaintiffs' bill of particulars indicates that plaintiff Crystal Castro was unemployed at the time of the accident and that plaintiff Victoria Castro claims that she was incapacitated from her employment for approximately one week after the accident. Plaintiffs also allege that they sustained economic loss in excess of basic economic loss as defined in Insurance Law § 5102 (a). The Court's computer records indicate that the note of issue in this action was filed on February 13, 2007.

Defendants now move for summary judgment dismissing the complaint on the grounds that plaintiffs did not sustain a "serious injury" as defined in Insurance Law § 5102 (d). In support of the motion, defendants submit the summons and verified complaint; their answer; plaintiffs' verified bill of particulars; plaintiff Victoria Castro's Southside Hospital emergency room records; the affirmed initial medical evaluation report dated August 19, 2003 of plaintiff Victoria Castro's treating physician Socorro Vincente, M.D. at Village Medical and Rehab; portions of plaintiff Victoria Castro's deposition transcript; the affirmed report dated December 6, 2006 of defendants' examining orthopedic surgeon Harvey Fishman, M.D. based on an examination of plaintiff Victoria Castro on the same date; the affirmed report dated December 6, 2006 of defendants' examining neurologist C.M. Sharma, M.D. based on an examination of plaintiff Victoria Castro on the same date; the affirmed report dated June 22, 2004 of defendants' examining radiologist Jacques Romano, M.D. who reviewed the MRI of plaintiff Victoria Castro's cervical spine; the affirmed report dated November 2, 2006 of defendants' examining orthopedic surgeon Harvey Fishman, M.D. based on an examination of plaintiff Crystal Castro on the same date; the affirmed report dated November 2, 2006 of defendants' examining neurologist C.M. Sharma, M.D. based on an examination of plaintiff Crystal Castro on the same date; the affirmed report dated June 22, 2004 of defendants' examining radiologist Jacques Romano, M.D. who reviewed the MRI of plaintiff Crystal Castro's cervical spine which was dated October 13, 2003; and a portion of plaintiff Crystal Castro's deposition transcript.

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."

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 a specific percentage of the loss of range of motion must be

ascribed 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 (*Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 746 NYS2d 865 [2000]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]).

It is for the court to determine in the first instance whether a prima facie showing of “serious injury” has been made out (*see, Tipping-Cestari v Kilhenny*, 174 AD2d 663, 571 NYS2d 525 [2d Dept 1991]). The initial burden is on the defendant “to present evidence, in competent form, showing that the plaintiff has no cause of action” (*Rodriguez v Goldstein*, 182 AD2d 396, 582 NYS2d 395, 396 [1st Dept 1992]). Once defendant has met the burden, plaintiff must then, by competent proof, establish a prima facie case that such serious injury exists (*Gaddy v Eyley*, 79 NY2d 955, 582 NYS2d 990 [1992]). Such proof, in order to be in a competent or admissible form, shall consist of affidavits or affirmations (*Pagano v Kingsbury*, 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]). The proof must be viewed in a light most favorable to the non-moving party, here, the plaintiff (*Cammarere v Villanova*, 166 AD2d 760, 562 NYS2d 808 [3d Dept 1990]).

Defendants established their prima facie burden on their motion, via their submissions, showing that plaintiffs did not sustain a “serious injury” within the meaning of Insurance Law § 5102 (d) as a result of the subject accident (*see, Orna v Singh*, 35 AD3d 826, 825 NYS2d 375 [2d Dept 2006]). The Southside Hospital emergency room records for plaintiff Victoria Castro indicate the fractured left wrist diagnosis was erroneous and that the final diagnosis was back sprain, low back pain and neck strain. The initial medical evaluation report from Village Medical and Rehab that plaintiff Victoria Castro went to five days after the accident reveals that she was complaining of neck pain radiating to the left shoulder and low back pain radiating into her left buttock and hip. Said report also indicates that she was employed as a hairdresser assistant, had missed two days of work and had since returned to work. On examination of plaintiff, Dr. Vicente noted moderate pain on cervical and lumbar range of motion with decreased range of motion in all directions due to pain and left sided cervical and lumbar paraspinal muscle tenderness consistent with spasm. Dr. Vicente diagnosed cervical and lumbar radiculopathy with spasm, secondary to the subject accident.

The affirmed report of defendants’ examining orthopedic surgeon reveals that three years after the accident, plaintiff Victoria Castro had specified range of motion testing results that were all normal upon examination of her cervical spine and upper extremities and her thoraco-lumbar spine and lower extremities. In addition, defendants’ examining orthopedic surgeon examined plaintiff’s left wrist, noting that plaintiff was right handed, and found that she had full range of motion of the wrist joint with excellent grip and pinch strength and that the Tinel, Phalen, Finkelstein and Allen tests were all negative. He concluded that plaintiff Victoria Castro had sustained a cervical and lumbosacral spine strain or sprain and contusion and sprain of the left wrist. According to defendants’ examining orthopedic surgeon, said conditions had resolved based on the lack of any objective findings of any residual orthopedic disability or any loss of bodily motion or function, adding that plaintiff had returned to work, based on her own account, three days after the accident and that she could continue to do so unrestricted.

Defendants’ examining neurologist also indicated by report that three years after the accident, plaintiff Victoria Castro had a normal neurological examination. Regarding the allegations of a disc herniation at C5-C6 and disc bulge at C6-C7, defendants’ examining radiologist concluded upon review of plaintiff’s MRI films dated October 25, 2003 that there were degenerative changes at C5-C6 and C6-C7,

that no discal extrusion was present, and that there was no finding suggestive of the sequelae of acute trauma.

At her deposition, plaintiff Victoria Castro testified that she missed seven days after the accident from her work as a hairdresser due to pain in her wrist. She testified that three months prior to the deposition she had delivered a baby and that she had started working part-time two months prior to the deposition.

With respect to plaintiff Crystal Castro, defendants' examining orthopedic surgeon found that three years after the accident an examination of her cervical spine and upper extremities revealed negative results for the Spurling compression test and that her specified range of motion test results were all normal with no paravertebral spasm. Tinel signs at plaintiff's elbows and wrists were negative bilaterally. In addition, her specified range of motion test results for her lumbosacral spine were described as normal with no paravertebral spasm and plaintiff's straight leg raising was negative to 90 degrees both seated and reclining. Defendants' examining orthopedic surgeon concluded that plaintiff had sustained a cervical and lumbosacral spine strain or sprain that had fully resolved. He opined that there were no objective findings of any residual disability or any loss of bodily motion or function, adding that plaintiff had no evidence of any herniated disc. Defendants' examining orthopedic surgeon also noted that plaintiff had related to him that she had returned to work three days after the accident as a hairstylist, working nine to twelve days.

Defendants' examining neurologist also indicated in a report listing the results of various neurological tests that three years after the accident, plaintiff Crystal Castro had a normal neurological examination. Upon reviewing the MRI of plaintiff Crystal Castro's cervical spine dated October 13, 2003, defendants' examining radiologist opined that plaintiff had not sustained a herniation, that she had a discal bulge at C6-C7, that there were minimal degenerative changes and no finding suggestive of the sequelae of acute trauma.

The submitted portion of the deposition testimony of plaintiff Crystal Castro reveals that she, like her sister, was employed at the time of the accident as a full time hairstylist and that she returned to work three or four days after the accident.

Here, defendants made a prima facie showing of entitlement to judgment as a matter of law by presenting objective evidence that the plaintiff did not sustain a serious injury as a result of the subject accident (*see, Wright v Peralta*, 26 AD3d 489, 809 NYS2d 465 [2d Dept 2006]). Said proof included the affirmed reports of defendants' examining orthopedic surgeon indicating that the specified measurements resulting from the objective range of motion tests plaintiffs underwent revealed that both plaintiffs had normal ranges of motion (*see, Wright v Peralta, supra; Villalta v Schechter*, 273 AD2d 299, 710 NYS2d 87 [2d Dept 2000]).

To defeat the defendants' motion, plaintiffs were required to come forward with competent admissible medical evidence, based on a recent examination and objective findings, sufficient to verify their subjective complaints of pain and limitation of motion (*see, Oliva v Gross*, 29 AD3d 551, 816 NYS2d 110 [2d Dept 2006]). Moreover, any significant lapse in time between the conclusion of each plaintiffs' medical treatment and the physical examination conducted by their physician had to be adequately explained (*see, Pommells v Perez*, 4 NY3d 566, 797 NYS2d 380 [2005]; *Ali v Vasquez*, 19 AD3d 520, 797 NYS2d 528 [2d Dept 2005]).

In opposition to the motion, plaintiffs contend that they did sustain a serious injury as defined in Insurance Law § 5102 (d). Plaintiffs submit, among other things, the affirmations dated March 27, 2007 of plaintiffs' treating physician Dr. Vincente employed by Village Medical and Rehab together with test results; the affirmed MRI reports of plaintiffs' cervical spines; and plaintiffs' affidavits.

The affirmed magnetic resonance imaging reports of a radiologist, Kornelia Teslic, M.D., dated October 14, 2003 and dated October 27, 2003 based on a review of cervical MRI films taken a day or two before indicated that plaintiff Crystal Castro had sustained a focal central disc herniation at C6-C7 and that plaintiff Virginia Castro had sustained a focal central disc herniation at C5-C6 and a disc bulge at C6-C7. In his affirmation, plaintiffs' treating physician Dr. Vincente referred to said reports.

In addition, Dr. Vincente indicated that he performed objective goniometric range of motion tests on plaintiff Crystal Castro on two separate occasions and that the numerically quantified results when compared with normal results revealed significant reductions in range of motion of both the cervical and lumbar spines. The results of range of motion testing on August 27, 2003 with respect to plaintiff Crystal Castro's cervical spine were, flexion 34 degrees (normal 50 degrees); extension 35 degrees (normal 60 degrees); left rotation 44 degrees (normal 80 degrees); right rotation 43 degrees (normal 80 degrees); left lateral flexion 31 degrees (normal 45 degrees); and right lateral flexion 29 degrees (normal 45 degrees). Results for plaintiff Crystal Castro's lumbar spine were flexion 2 degrees (normal 60 degrees) and extension 1 degree (normal 25 degrees). According to Dr. Vincente, said results revealed a total spinal impairment of 43 percent. Dr. Vincente provided results for similar range of motion testing performed on plaintiff Crystal Castro on March 1, 2007 with cervical spine measurements of, flexion 1 degree (normal 50 degrees); extension 1 degree (normal 60 degrees); left rotation 10 degrees (normal 80 degrees); right rotation 10 degrees (normal 80 degrees); left lateral flexion 6 degrees (normal 45 degrees); and right lateral flexion 7 degrees (normal 45 degrees). Lumbar spine results were flexion 5 degrees (normal 60 degrees) and extension 5 degrees (normal 25 degrees). Dr. Vincente noted that said results showed a deterioration and a whole spinal impairment of 53 percent.

Regarding plaintiff Victoria Castro, Dr. Vincente indicated in his affirmation that she also underwent objective goniometric range of motion tests on two different occasions and that the numerically quantified results when compared with normal results revealed significant reductions in range of motion of both the cervical and lumbar spines. The results of range of motion testing on August 27, 2003 with respect to plaintiff Victoria Castro's cervical spine were, flexion 31 degrees (normal 50 degrees); extension 32 degrees (normal 60 degrees); left rotation 43 degrees (normal 80 degrees); right rotation 45 degrees (normal 80 degrees); left lateral flexion 26 degrees (normal 45 degrees); and right lateral flexion 26 degrees (normal 45 degrees). The results for plaintiff Victoria Castro's lumbar spine were flexion 24 degrees (normal 60 degrees) and extension 24 degree (normal 25 degrees). According to Dr. Vincente, said results revealed a total spinal impairment of 25 percent. Upon re-examination on March 13, 2007, Dr. Vincente provided results for similar range of motion testing performed on plaintiff Victoria Castro with cervical spine measurements of, flexion 27 degrees (normal 50 degrees); extension 26 degrees (normal 60 degrees); left rotation 17 degrees (normal 80 degrees); right rotation 18 degrees (normal 80 degrees); left lateral flexion 24 degrees (normal 45 degrees); and right lateral flexion 25 degrees (normal 45 degrees). Her lumbar spine results were flexion 33 degrees (normal 60 degrees) and extension 24 degrees (normal 25 degrees). Dr. Vincente noted that said results showed a deterioration and a whole spinal impairment of 44 percent.

Dr. Vincente opined to a reasonable degree of medical certainty that based on said findings, plaintiff Crystal Castro and Virginia Castro had sustained a significant loss of function of their cervical and lumbar spines and that the injuries were directly caused by the subject accident. In addition, Dr. Vincente explained the nature of the plaintiffs' treatment but not the duration and stated that both plaintiffs had stopped treatment because they had reached their maximum medical improvement through a conservative course of managed care. He also provided a qualitative assessment that both plaintiffs were restricted in certain activities including bending, lifting, extended sitting, household chores and general personal care and that their employment as hairdressers was impacted by ongoing pain and discomfort. Dr. Vincente stated that each plaintiff was shown a course of home exercises and discharged from treatment and opined that each plaintiff had sustained a partial-permanent injury.

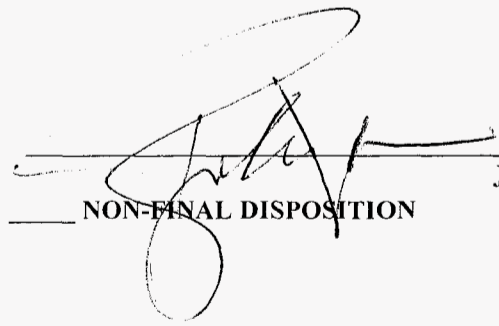
Plaintiff Crystal Castro explained in her affidavit dated March 22, 2007 that her treating physician recommended that she undergo an aggressive course of physical therapy, chiropractic treatment, massage and acupuncture therapy including heat packs, electrical stimulation, massage and exercise at a rate of several times per week. Plaintiff added that she underwent said treatment for four months and was evaluated periodically. According to plaintiff, she realized that therapy was not resolving her pain and discomfort and after discussing the matter with her doctor it was decided that the occasional minimal relief gained from therapy did not offset the significant amount of time that she spent at therapy. Plaintiff stated that her therapy was ultimately discontinued based on the therapist's finding of maximum improvement and that she was shown home exercises which she continues to do. She described her pain as severe and continuing in her neck and back and indicated that she was limited in turning, bending, lifting and carrying which affected her work week hours and household chores such as washing, vacuuming, cooking and cleaning. Plaintiff stated that at work, after only a few haircuts, she was forced to stop and rest or attempt to stretch to make it through the day. She added that prior to the accident she used to take dance classes and that she could no longer participate in such classes.

In her affidavit also dated March 22, 2007, plaintiff Victoria Castro cursorily stated that she still experienced pain and restriction of motion in her neck and low back on a regular basis without detailing how such symptoms affected her daily activities.

Here, plaintiffs' evidence failed to raise a triable issue of fact (*see, Lee v Troia*, 2007 WL 1629916 [NYAD 2 Dept]; *Passaretti v Ping Kwok Yung*, 39 AD3d 517, 835 NYS2d 224 [2d Dept 2007]). The affirmed magnetic resonance imaging reports of radiologist Kornelia Teslic, M.D. and the affirmations of plaintiffs' treating physician Dr. Vincente did not address the findings of degenerative changes noted in the affirmed reports of defendants' radiologist thus rendering speculative the findings by Dr. Vincente that both plaintiff's injuries were directly caused by the subject accident (*see, id.*; *see also, Phillips v Zilinsky*, 39 AD3d 728, 834 NYS2d 299 [2d Dept 2007]). Plaintiffs' other submissions fail to remedy said defect (*see, Bartley v Trans Car & Limo, Inc.*, ___ NYS2d ___, 2007 WL 1776085, 2007 NY Slip Op 05446 [NYAD 2 Dept Jun 19, 2007]; *Gordon-Silvera v Long Island R. R.*, ___ NYS2d ___, 2007 WL 1632844, 2007 NY Slip Op 04791 [NYAD 2 Dept Jun 05, 2007]).

Accordingly, the instant motion is granted.

Dated: JUL 17 2007



J.S.C.

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