

Moreno v Wudha

2007 NY Slip Op 32185(U)

July 16, 2007

Supreme Court, Suffolk County

Docket Number: 0023909/2005

Judge: Robert W. Doyle

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

P R E S E N T :

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 3-28-07
ADJ. DATE 5-31-07
Mot. Seq. # 002 - MD

-----X
MARIA MORENO, :
 :
 Plaintiff, :
 :
 - against - :
 :
 KELECHI WUDHA and S. P. WILLIAMSON- :
 ALLEN, :
 Defendants. :
-----X

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Upon the following papers numbered 1 to 26 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 10 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 11 - 24 ; Replying Affidavits and supporting papers 25 - 26 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (002) by defendants Kelechi Wudha and S.P. Williamson-Allen pursuant to CPLR 3212 and Insurance Law §5102(d) for an order granting summary judgment dismissing the complaint of plaintiff Maria Moreno, asserting plaintiffs' injuries do not meet the serious injury threshold, opposed by plaintiff, is denied.

This is an action sounding in negligence arising out of a motor vehicle accident which occurred on December 30, 2004, on W. William Street, Bayshore, County of Suffolk, State of New York. It is alleged that defendant S.P. Williamson-Allen was the owner of a 1992 red Ford suburban motor vehicle being operated by defendant Kelechi Wudha. Plaintiff was the operator of a gray 1994 Toyota Camry motor vehicle.

Maria Moreno has claimed in her bill of particulars that as a result of the accident, she sustained, inter alia, a cerebral concussion, left shoulder sprain and strain with permanent limited loss of range of motion to both shoulders, bulging discs at C 4-5 and C 5-6 which disc material approximates the ventral sac, permanent loss of range of motion of the cervical spine, thoracic spine sprain and strain, thoracic radiculopathy with permanent limited mobility of the thoracic spine, bulging disc at L 4-5 which disc material approximates the ventral thecal sac, permanent limited mobility of the lumbar spine, right and left knee sprains and strains, and post traumatic stress syndrome with acute anxiety and severe depression.

Defendants claim entitlement to an order granting summary judgment dismissing the complaint, asserting plaintiffs did not sustain serious injury sufficient to meet the threshold pursuant to Insurance Law of the State of New York §5102(d).

On a motion for summary judgment to dismiss a complaint for failure to set forth a prima facie case of serious injury as defined by Insurance Law § 5102(d), the initial burden is on the defendant to “present evidence in competent form, showing that 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, the plaintiff must then, by competent proof, establish a *prima facie* case that such serious injury exists (*DeAngelo v Fidel Corp. Services, Inc.*, 171 AD2d 588, 567 NYS2d 454, 455 [1st Dept 1991]). Such proof, in order to be in competent or admissible form, shall consist of affidavits or affirmations (*Pagano v Kingsbury*, 182 AD2d 268, 587 NYS2d 692 [2nd 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, 810 [3rd Dept 1990]).

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 Eyles*, 79 NY2d 955, 582 NYS2d 990 [1992]).

Insurance Law §5102(d) provides in pertinent part that “[s]erious injury’ means a personal injury which results in 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.”

The term “significant,” as it appears in the statute, has been defined as “something more than a minor limitation of use,” and the term “substantially all” has been construed to mean “that the person has been curtailed from performing his usual activities to a great extent rather than some slight curtailment (*Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570).

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 [2nd Dept 1982]).

Defendants have supported this motion with, inter alia, copies of the summons and complaint; answer;

plaintiff's verified bill of particulars; signed, sworn copy of the deposition transcript of plaintiff; and copies of the reports of orthopedist Joseph Stubel, M.D., dated October 24, 2006, neurologist Richard Pearl, M.D. dated October 25, 2006, and radiologist Melissa Sapan Cohn, M.D. dated October 17, 2006. In reviewing those submissions, it is determined that defendants have failed to establish prima facie entitlement to an order granting summary judgment.

At her examination before trial, Maria Moreno testified that she has worked full time at C&B Components for almost seven years. She cleans small parts and sends out orders. On the date of the accident, she was going to make a right hand turn into her driveway when she was struck on the right side of her vehicle by defendant's vehicle. About two hours after the accident, she started feeling pain in her back and head. She took two Advil. About four or five days later when she was taking her daughter to the babysitter, the babysitter recommended that she go to therapy. She started therapy every afternoon, five days a week for a month. Therapy was then decreased to four days a week, to three times a week, to one day a week over a three to four month period. Therapy consisted of massage therapy, chiropractic and electrical therapy. She was sent for MRI's and nerve testing. She stated she could not continue going to therapy because her insurance ran out. Her back hurt a lot so she went to her primary care physicians, Dr. Erica Hive and Dr. Sicara, who referred her to a spine specialist.

Plaintiff testified she did not miss any time from work, she did not lose any pay, and her job has not changed in any way because of injuries claimed in this accident. Because of the injuries resulting from the accident, she has difficulty cleaning around the house because she has a lot of pain. She cannot do heavy lifting at work. She has to work sitting down, but still feels pain. She stated that when she was in therapy it brought her some relief, but since she is not going anymore, her back bothers her and she feels like she is being stabbed in the back. She cannot carry her daughter because the next day when she wakes up, she is in bad shape. She cannot move furniture or lift anything heavy. She does everything else, but it takes her a lot longer and it is harder for her to do. Plaintiff denied any other previous injuries to her neck, back or left shoulder but did have a prior injury to her left arm from a machine at a bakery.

Dr. Joseph Stubel examined plaintiff on October 24, 2006 and indicates he reviewed the electro diagnostic studies, computerized range of motion studies, chiropractic treatment notes, physical therapy notes, and MRI reports of the cervical and lumbosacral spine of March 16, 2005 and February 9, 2005, respectively. He quantified his findings as to range of motion in plaintiff's cervical spine, revealing no deficits. He found full range of motion in his examination of plaintiff's shoulders, lower back and knees. He sets forth that he finds no objective signs of disability and diagnosed plaintiff with sprains of the neck, shoulder, lower back and both knees. His history revealed that within a few days of the accident, Ms. Moreno started physical therapy, chiropractic treatment, acupuncture and massage therapy, each four times a week until about six months before the date of his examination on October 24, 2006. Although Dr. Stubel indicated he reviewed the MRI reports of plaintiff's cervical and lumbar spines, he does not set forth the findings or comment on the same in relation to his clinical findings upon examination. Dr. Stubel opines that the accident reported on December 30, 2004 has a causal relationship to the symptoms described. He states he found no objective signs of disability, no further orthopedic treatment or physical therapy treatment is required, and that plaintiff can perform her usual activities of daily living and her usual work.

Dr. Richard Pearl examined plaintiff on October 25, 2006 and elicited complaints of pain in her neck, thoracic spine on the left side, and occasional pain radiating from the neck down the left upper extremity. He sets forth that at times she cannot hold things with her left hand and also experiences pain in her left shoulder

and low back. Upon examination of plaintiff, he noted the range of motion of the lumbar spine to be 45 degrees flexion (80 degrees set forth as normal), and extension was noted to be 10 degrees (25 degrees set forth as normal). Dr. Pearl does not address these findings which are not within normal range. His impression was that of cervical, thoracic and lumbosacral sprain, with no objective findings to indicate neurological injury, need for neurological healthcare, testing or neurological disability. He states he made no findings to indicate the presence of carpal tunnel syndrome. He deferred discussion regarding allegations involving the left shoulder to appropriate orthopedic consultants and recommended neuroradiological review of MRI films. He does not correlate his clinical findings with those findings set forth in the MRI reports which he reviewed, and which reports have not been provided by defendants with the moving papers to this court. It is Dr. Pearl's impression that plaintiff sustained a cervical, thoracic and lumbosacral sprain, with no objective findings to indicate neurological injury, the need further neurological healthcare, testing, or neurological disability.

Dr. Melissa Cohn by way of a sworn letter dated October 17, 2006, indicates she reviewed the cervical and lumbosacral spine MRIs of Maria Moreno. As to the cervical spine MRI taken March 11, 2005, she found there was straightening of the normal cervical lordosis with mild disc bulging at C4-5 and minimal disc bulging at the C 5-6 level, however, the amount of bulge is not quantified in terms of measurement. Concerning the straightening of the normal cervical lordosis, she indicated this may reflect muscular spasm, or alternatively, this may result from the positioning of patient's neck within the cervical coil necessary to perform the examination. She concludes the disc bulging at C4-5 and C 5-6 is unrelated to trauma. Dr. Cohn states that the patient has a congenital abnormality known as Chiari I malformation, a condition which the patient is born with where the inferior aspect of the cerebellum or cerebellar tonsils are displaced through the foramen magnum which may predispose her to headaches or cervical cord syrinx which is not noted. Dr. Cohn states that the patient has mild degenerative changes present at the C 4-5 and C5-6 levels and she does not see evidence of an acute trauma-related injury on the study. Dr. Cohn finds the lumbosacral spine MRI reveals a normal lumbar lordosis and the lumbosacral spine is normal with no evidence of disc bulge or disc pathology at any level.

Based upon review of all defendants' submissions, it is determined that defendants have introduced evidence concerning bulging discs in plaintiff's cervical spine at C 4-5 and C 5-6. A disc bulge may constitute a serious injury within the meaning of Insurance Law §5102 (*Hussein et al v Harry Littman et al*, 287 AD2d 543, 731 NYS 2d 477 [2nd Dept 2001]). Dr. Pearl has set forth quantified limitations in range of motion concerning his examination of plaintiff's lumbosacral spine, indicating flexion to be 45 degrees (80 degrees set forth as normal), and extension was noted to be 10 degrees (25 degrees set forth as normal). Neither Dr. Pearl nor Dr. Stubel have correlated their findings upon physical examination with the results of the MRI reports and do not comment upon what is set forth in the MRI reports provided to them at the time they examined plaintiff. Therefore, due to the existence of these factual issues, defendants have not demonstrated that plaintiff did not suffer a serious injury within the meaning of Insurance Law §5102.

Additionally, neither Dr. Pearl nor Dr. Stubel examined plaintiff until almost two years after the statutory period of 180 days following the accident, thus rendering defendant physicians' affidavits insufficient to demonstrate entitlement to an order granting summary judgment and dismissing the complaint on the issue of whether plaintiff was unable to substantially perform all of the material acts which constituted her usual and customary daily activities for a period in excess of 90 days during the 180 days immediately following the accident (*Blanchard v Wilcox*, AD2d , 725 NYS2d 433 [3rd Dept 2001]). Plaintiff testified in her examination before trial concerning the problems she has doing house work, how she cannot lift anything heavy, cannot carry her daughter without having such pain the next day, and she has to perform her

job at work in a sitting position. Thus factual issues have been raised in defendants' moving papers concerning whether or not plaintiff sustained serious injury within the meaning of Insurance Law §5102 and whether plaintiff was unable to substantially perform all of the material acts which constituted her usual and customary daily activities for a period in excess of 90 days during the 180 days immediately following the accident.

Accordingly, defendants' motion (002) for an order granting summary judgment is denied.

Inasmuch as defendants failed to meet their initial burden of establishing a prima facie case of entitlement to an order granting summary judgment, the sufficiency of plaintiff's opposition papers need not be considered (*see, Paulino v Dedios*, 24 AD3d 741, 807 NYS2d 397 [2d Dept 2005]; *Birnbaum v Constanza*, 17 AD3d 304, 791 NYS2d 853 [2d Dept 2005]). However, in reviewing plaintiff's opposing papers, it is determined that plaintiff has raised factual issues to preclude an order granting summary judgment.

In opposing this motion, plaintiff has submitted, inter alia, copies of the pleadings, bill of particulars, various decisions in other cases unrelated to this action, a copy of the transcripts of the examination before trial of defendants, a copy of a sworn narrative report from Irage Yebudian, M.D. of Padova Physical Rehabilitation (same report exhibits H, I and K), sworn and notarized affidavit of chiropractor Steven Klein and the affirmation of radiologist Allen Rothpearl, M.D.

Dr. Rothpearl sets forth in his affirmation that he supervised the MRI taken of plaintiff's spine and found a disc bulge at L4-5 where the disc material approximates the ventral thecal sac and is encroaching on the ventral subarachnoid space, with a contour abnormality of the thecal sac due to the annulus fibrosis. There is cerebral spinal fluid displacement due to the combination of the annulus fibrosis and nucleus pulposus of the disc encroaching the thecal sac. He also diagnosed a marked straightening and reversal of the lordosis and disc bulges in the cervical spine at the C 4-5 level and at the C 5-6 level. He further states that where disc material approximates the ventral thecal sac, it is encroaching on the ventral subarachnoid space with a contour abnormality of the thecal sac due to the annulus fibrosus of the disc. There is also cerebral spinal displacement due to the combination of the annulus fibrosus in combination with the nucleus pulposus of the disc encroaching on the thecal sac. Dr. Rothpearl also states there is a decreased signal on the long TR sequence throughout the visualized cervical disc levels indicating discogenic changes possibly related to poor hydration within the nucleus pulposus of the disc.

Dr. Yehudian sets forth in the signed affirmation that plaintiff came to his office on January 17, 2005 for treatment of injuries she suffered in a motor vehicle accident on December 30, 2004. Dr. Yehudian performed electrodiagnostic studies, computerized dynamic range of motion and functional evaluation studies, and EMG of the upper extremities. The range of motion studies revealed quantified significant deficits in the ranges of motion of the cervical and lumbar spines. The electrodiagnostic studies revealed mild right motor median nerve neuropathy at the wrist consistent with a clinical diagnosis of carpal tunnel syndrome. Electrodiagnostic studies also revealed left sided C5/C6 nerve root dysfunction affecting the posterior ramus, and an L4/L5 radiculopathy. Dr. Yehudian sets forth that in his review of the reports and records, he collectively diagnoses with a reasonable degree of medical certainty that plaintiff's injuries which she sustained in the automobile accident of December 30, 2004 qualify as "serious injuries" pursuant to New York State Insurance Law Section 5102(d), because despite prolonged, conservative rehab therapy full recovery has not been noted and the patient continues to demonstrate signs and symptoms of cervical-lumbar difficulties. He further states chronic arthritis and bursitis of the affected areas will be expected in the future. He also

states plaintiff's injuries are serious because of the straightening and reversal of the lordosis, disc bulge at the C4-5 level with disc material approximating the ventral thecal sac, cerebrospinal fluid displacement, disc bulge at C5-6 and the disc bulge at L4-5. Dr. Yehudian also states these injuries were caused by the motor vehicle accident of December 30, 2004, and are permanent in nature.

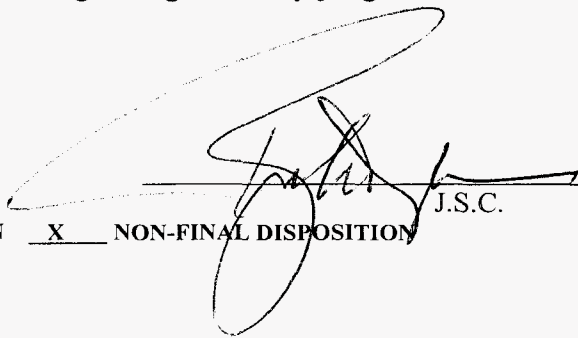
In addition to the affirmation of Dr. Yehudian, plaintiff also submitted a narrative report concerning Dr. Yehudian's care and treatment of plaintiff from his initial evaluation on January 5, 2005. In the narrative report Dr. Yehudian sets forth the patient has sustained permanent and partial injuries to her neck and back which limit her ability to utilize her cervical and lumbar spine, and these findings will permanently and partially affect the normal range of motion of the cervical and lumbar spine. Dr. Yehudian also states plaintiff was experiencing headaches which are mostly under control. Her shoulder pain has improved considerably.

Plaintiff also submitted the sworn affidavit of Steven Klein, a chiropractor from Twin Chiropractic where plaintiff was first treated by Julie Flack, chiropractor, on January 3, 2005 for complaints of shoulder and back pain following the car accident of December 30, 2004. Upon examination of the entire cervical spine, she was found to have muscle spasms and tenderness to digital palpitation of the paraspinal musculature, trapezium, deltoid, supraspinatus, infraspinatus, rhomboids and levator scapulae musculature bilaterally. Upon examination of the lumbar spine, she was found to have muscle spasms and tenderness of the lumbar paraspinal musculature and piriformis muscle. Spinal percussion test, Fabere-Patrick test, straight leg raising test, Braggards, Kemps, Heel Walk and Toe Walk testing were all positive. He set forth quantified deficits in the range of motion tests for the lumbar spine in all areas. Based upon review of Julie Flack's report, he op.ned with a reasonable degree of medical certainty that the injuries sustained by plaintiff in the motor vehicle accident (segmental dysfunction, thoracic segmental dysfunction, lumbar spine strain/sprain and thoracic sprain/strain) were proximately caused by the accident, and that recovery from the same is poor.

Based upon review of plaintiff's submissions, it is determined that plaintiff has demonstrated the existence of triable issues of fact to preclude an order granting summary judgment. These issues of fact concern whether plaintiff's injuries, concerning the diagnosis of bulging discs in plaintiff's cervical and lumbar spine, carpal tunnel syndrome, permanency and prognosis associated with those injuries, based upon the admissible affirmations, reports and testing which set forth quantified findings of limitation of the range of motion of the cervical and lumbar spines, constitute serious injury within the meaning of Insurance Law §5102.

Accordingly, defendants' motion for an order granting summary judgment on the issue of serious injury is denied.

Dated: JUL 16 2007


____ J.S.C.
 FINAL DISPOSITION NON-FINAL DISPOSITION