

Rodriguez v Testo

2007 NY Slip Op 32941(U)

September 20, 2007

Supreme Court, Rensselaer County

Docket Number: 0215844/2007

Judge: George B. Ceresia

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**STATE OF NEW YORK
SUPREME COURT**

COUNTY OF RENSSELAER

JUANA RODRIGUEZ, SHARON
MARTINEZ and JENNY ARROYO,

Plaintiffs,

-against-

Index No.: 215844
RJI No.: 41-0149-2006

JAMES TESTO and CHRISTOPHER TESTO,

Defendants.

All Purpose Term

Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding

Appearances:

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DECISION/ORDER

George B. Ceresia, Jr., Justice

Plaintiffs commenced the instant action seeking recovery for injuries sustained as a result of an automobile accident that occurred on February 26, 2005. Plaintiffs were in an automobile stopped at a traffic signal when an automobile driven by defendant Christopher Testo collided with the rear end of such car.

Defendants have made a motion for summary judgment pursuant to CPLR 3212 on the ground that plaintiffs Juana Rodriguez and Sharon Martinez have not suffered a serious injury within the meaning of Insurance Law § 5102(d). Defendants rely upon affirmations of an orthopedic surgeon, an affirmation from a neurologist, medical records from plaintiff's treating health care providers and the transcripts of plaintiffs' examinations before trial in support of the motion.

The Court is mindful that summary judgment is a drastic remedy which should not be granted where there is any doubt as to the existence of a triable issue (Sternbach v Cornell University, 162 AD2d 922, 923 [Third Dept., 1990]). The focus should be on issue identification rather than issue determination (Sternbach v Cornell University, supra). The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form to demonstrate the absence of any material issues of fact (see Zuckerman v City of NY, 49 NY2d 557, 562 [1980]; Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; Ayotte v Gervasio, 81 NY2d 1062 [1993]). Once such a showing has been made, the burden shifts to the party opposing the motion for summary judgment to submit evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (Zuckerman v City of NY, supra; Alvarez v Prospect Hosp., supra; see also Wahila v Kerr, 204 AD2d 935, 936-937 [Third Dept., 1994]). The Court's function is to view the evidence in the light most favorable to the

party opposing the motion, giving that party the benefit of every reasonable inference, and determine whether there is any triable issue of fact outstanding (see Simpson v Simpson, 222 AD2d 984, 986 [Third Dept., 1995]; Boyce v Vazquez, 249 AD2d 724, 725 [Third Dept., 1998]).

Under Insurance Law § 5102 (d) a serious injury is defined 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.

Plaintiffs' bills of particulars allege that they sustained permanent consequential limitations of use of a body organ or member and significant limitations of use of a body function or system based upon soft tissue injuries to their backs and necks.

As the moving party, defendants, in the first instance, are required to present evidence in admissible form sufficient to establish that plaintiff did not suffer a serious injury within the meaning of Insurance Law § 5102 [d] (see Tankersley v Szesnat, 235 AD2d 1010, 1011 [Third Dept., 1997]; Tompkins v Burtnick, 236 AD2d 708 [Third Dept., 1997]; Podwirny v De Caprio, 194 AD2d 1057 [Third Dept., 1993]; Weaver v Derr, 242 AD2d 823, 824 [Third Dept., 1997]; Kristel v Mitchell, 270 AD2d 598 [Third Dept., 2000]). It is only if such a showing is made that the burden shifts to plaintiff to proffer competent medical evidence based upon objective medical findings and diagnostic tests

to support his claim (see Gaddy v Eyler, 79 NY2d 955, 957 [1992]; Eisen v Walter & Samuels, 215 AD2d 149, 150 [First Dept., 1995]; Tankersley v Szesnat, supra; Jordan v Baine, 241 AD2d 894, 895 [Third Dept., 1997]).

With respect to plaintiff Rodriguez, defendants submitted an affirmation from John H. Buckner, M.D., an orthopedic surgeon. Dr. Buckner conducted an examination of plaintiff Rodriguez on February 2, 2007, almost two years after the accident. Dr. Buckner stated that he found normal range of motion in the muscles of plaintiff's cervical, thoracic and lumbar spine with no evidence of tenderness, spasm or deformity. He did not state the nature of the tests performed, nor did he give any of the actual test results. He concluded that there was no evidence of any disability related to the accident.

With respect to plaintiff Martinez, defendants submitted affirmations from John H. Buckner, M.D. and Patrick Hughes, M.D., a psychiatrist and neurologist. Dr. Buckner conducted an examination of plaintiff Martinez on February 2, 2007, almost two years after the accident. As with plaintiff Rodriguez, Dr. Buckner stated that he found normal range of motion in plaintiff's cervical, thoracic and lumbar spine with no evidence of tenderness, spasm or deformity. He then qualified such finding by stating that even though plaintiff Martinez could only reach her knees on forward bending, rather than her toes, it constituted full range of motion for a person of her age (only 25 years) and habitus. He did not explain such opinion, did not state the nature of the tests performed, nor did he give any of the actual test results other than plaintiff Martinez's inability to

reach further than her knees. He concluded that there was no evidence of any disability related to the accident.

Dr. Hughes found normal strength in several named muscles and normal reflexes. He then listed his finding as to range of motion of the neck and back, which included numerous findings of significant restrictions in the range of motion, such as rotation of the neck to the left and right of only 10 degrees, forward flexion of the back of only 20 degrees and extension of the back of 0 degrees. Dr. Hughes did not set forth any quantification of the decrease in the range of motion nor did he compare plaintiff's range of motion with the normal range for a person of plaintiff's age. He did not even acknowledge the fact that the results of the range of motion tests were not normal (see Hubert v Tripaldi, 307 AD2d 692 [Third Dept., 2003]).

The doctors' submissions concerning both plaintiffs are entirely conclusory and tailored to exclude the injuries from the statutory definition. "Such conclusory statements do not constitute the prima facie evidentiary showing that is required of the proponent of a summary judgment motion (see, Winegrad v New York Univ. Med. Ctr., supra, at 852-853)." (Christiana v Benedictine Hosp. 248 AD2d 910, 913 [Third Dept., 1998]). Defendants have therefore failed to make a prima facie showing that plaintiffs did not sustain a serious injury, requiring denial of the motion.

Even if defendants had met their burden, plaintiffs have submitted an affidavit from their treating chiropractor, Craig Wehrenberg, D.C., who found trigger points and

spasms on palpation of plaintiff Rodriguez's back. He found significant decreases in the range of motion of plaintiff Rodriguez's cervical and lumbar spine. He opined that plaintiff Rodriguez lost 42% of her range of cervical motion and 36% of her range of lumbar motion, resulting in an inability to clean her house or turn her head while driving (cf. Toure v Avis Rent A Car Sys., 98 NY2d 345, 350 [2002]; Gonzalez v Green, 24 AD3d 939, 940-941 [Third Dept., 2005]) for the entire period of his treatment from October, 2005 to October 2006. It appears that his treatment ended upon cessation of no-fault benefits. Such medical evidence is sufficient to raise a triable issue of fact as to whether plaintiff Rodriguez sustained a significant limitation of use of a body function or system (see Lopez v Senatore, 65 NY2d 1017, 1020 [1985]; Verderosa v Simonelli, 260 AD2d 293 [First Dept., 1999]; Nathanson v David, 244 AD2d 930 [Fourth Dept., 1997]).

He also found abnormal results from a paraspinal surface electromyographic scan, which measures differences in muscle tension, a paraspinal thermal scan, which assesses sympathetic nerve function, and a digital motion x-ray, which assesses ligamentous instability of the spine. Dr. Wehrenberg stated that all three constitute objective tests. However, he did not explain how the abnormal results reflected or related to any significant physical limitations, as required (see Pommells v Perez, 4 NY3d 566, 574 [2005]) nor has the Court found any reference to such tests in any case law. As such, the proof of the abnormal results of such tests does not serve to show the existence of a serious injury.

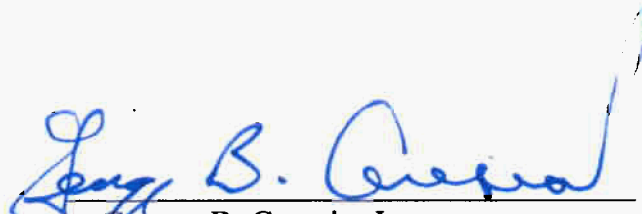
With respect to plaintiff Martinez, Dr. Wehrenberg found significant decreases in the range of motion of her cervical and lumbar spine, as well as abnormal results from a paraspinal surface electromyographic scan, a paraspinal thermal scan and a digital motion x-ray. He admitted that the range of motion testing was not objective, and no other objective tests have been mentioned. He opined that plaintiff Martinez lost 65% of her range of cervical motion and 72% of her range of lumbar motion, resulting in an inability to bend or twist, or to stand for more than 30 minutes or sit for more than 20 minutes for the entire period of his treatment from October, 2005 to October 2006. It appears that all of such conclusions are based upon subjective complaints of pain. As with plaintiff Rodriguez, he again failed to explain how the abnormal test results reflected or related to any significant physical limitations, as required. As such, plaintiff Martinez's submissions would not be sufficient to raise a triable issue of fact if defendants had met their burden.

Accordingly, it is

ORDERED, that defendants' motion for summary judgment dismissing the complaint as to plaintiffs Rodriguez and Martinez is hereby denied.

This shall constitute the Decision and Order of the Court. All papers are returned to the attorneys for the plaintiffs, who are directed to enter this Decision/Order without notice and to serve defendants' counsel with a copy of this Decision/Order with notice of entry.

Dated: Troy, New York
September 20, 2007



George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

Notice of Motion dated April 2, 2007; Affidavit of Donald P. Ford, Esq. sworn to April 2, 2007 with Exhibits A-I annexed; Affirmation of John H. Buckner, M.D., dated February 2, 2007; Affirmation of John H. Buckner, M.D., dated February 2, 2007 with Exhibit annexed; Affirmation of Patrick Hughes, M.D., dated February 21, 2007 with Exhibits annexed;

Memorandum of Law dated April 2, 2007;

Affirmation of Heather J. Redlich, Esq., dated May 18, 2007; Affidavit of Craig Wehrenberg, D.C. sworn to May 16, 2007 with Exhibits annexed;

Memorandum of Law dated May 18, 2007;

Reply "Affidavit" of Kelly M. Monroe, Esq., unsworn, dated May 24, 2007.