

Mengouchian v Castellano

2007 NY Slip Op 33426(U)

October 16, 2007

Supreme Court, Suffolk County

Docket Number: 0020229/2005

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 6-27-07
ADJ. DATE 9-13-07
Mot. Seq. # 001 - MD

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NORA MENGOUCHIAN,	:	MARK A. MUSACHIO, ESQ.
	:	Attorney for Plaintiff
Plaintiff,	:	1641 Deer Park Avenue
	:	Deer Park, New York 11729
- against -	:	
	:	SCALZI & NOFI
CHRIS CASTELLANO,	:	Attorneys for Defendant
	:	150 Broad Hollow Road, Suite 320
Defendant.	:	Melville, New York 11747
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Upon the following papers numbered 1 to 23 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 11-20; Replying Affidavits and supporting papers 21-23; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is.

ORDERED that this motion by defendant for summary judgment dismissing the complaint on the basis that plaintiff did not sustain a “serious injury” as defined in Insurance Law § 5102 (d), is denied.

This is an action to recover damages for serious injuries allegedly sustained by plaintiff as a result of a motor vehicle accident that occurred at or near the intersection of Colonial Street and Larkfield Road, East Northport, New York on November 1, 2002. The accident allegedly happened when the vehicle owned and operated by defendant struck the vehicle operated by the plaintiff. Defendant now moves for an order pursuant to CPLR 3212 granting him summary judgment dismissing the complaint on the grounds that plaintiff did not sustain a “serious injury” as defined in Insurance Law § 5102 (d).

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 a “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 (*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 Eycler*, 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 nonmoving party, here, the plaintiff (*Cammarere v Villanova*, 166 AD2d 760, 562 NYS2d 808 [3d Dept 1990]).

In support of this motion, defendant submits, inter alia, the pleadings; plaintiff’s bill of particulars; the affirmed report of defendant’s examining orthopedist, S. Farkas, M.D.; the affirmed report of defendant’s examining neurologist, Beatrice C. Engstrand, M.D.; and the plaintiff’s deposition testimony. Plaintiff claims in her bill of particulars that she sustained a transitional vertebra at L5; herniated discs in the cervical spine, causing spinal cord compression and requiring spinal surgery; a right shoulder injury; cervical radiculopathy; a limitation of the range of motion of the cervical spine in various directions; and a severe exacerbation of a pre-existing degenerative condition of the cervical spine. Plaintiff claims that she was partially disabled from November 1, 2002 to date and continuing. Additionally, plaintiff claims that she has been incapacitated from work for a period exceeding the statutory minimum for a serious injury, and that she has been incapacitated from work on an intermittent basis since the accident. The Court construes these allegations to mean that plaintiff claims that she sustained a serious injury in the categories of a permanent consequential limitation, a significant limitation and a non-permanent injury.

In his report dated October 24, 2006, Dr. Farkas states that he performed an independent orthopedic examination of plaintiff on that date, and his findings include thoracolumbar scoliosis with a left-sided rib hump; a motor exam that was “5+”; full stability of the right shoulder with a negative impingement test; and a negative straight leg raising test. He also found that plaintiff’s cervical rotation, flexion and extension were 70/70, 40 and 40 degrees, with the normal ranges being 70-80/70-80, 30-50 and 30-50 degrees. In connection with plaintiff’s range of cervical motion, Dr. Farkas noted that she promptly rotated her cervical spine at least 80 degrees to the left and right as he examined her shoulder and performed the sensory portion of the examination. Additionally, he found that plaintiff’s active right shoulder abduction was to 100 degrees, but that her passive range was to 120 degrees. Dr. Farkas further

found that plaintiff's internal rotation of the right shoulder was to "L4 bilaterally," with normal being 160-170 degrees. In this regard, he commented that there was a "subjective show of a decreased range of motion" of the right shoulder as plaintiff resisted any further motion. Dr. Farkas opined that plaintiff sustained a sprain of the right shoulder and sprains of the cervical and lumbar sprains which had resolved, and that her cervical myofascitis which was due to a pre-existing pathology. He also opined, however, that the decreased range of motion of the right shoulder may have a "cervical component". Furthermore, Dr. Farkas concluded that plaintiff was capable of carrying out the activities of her daily living and that she was not disabled.

In her report dated October 27, 2006, Dr. Engstrand states that she performed an independent neurological examination of plaintiff on October 24, 2006, and her findings include a normal range of motion of the cervical spine; normal muscle tone, bulk and power with no atrophy or fasciculation; normal sensory testing; reflexes that were "2" and equal bilaterally; and a normal gait. She also observed that plaintiff's cervical flexion, extension, rotation and lateral flexion were 45, 15, 70 and 40 with the normal ranges being 45, 45, 70 and 40 degrees. Dr. Engstrand opined that the 30 degree limitation of plaintiff's cervical extension was due to "guarding from pain," and that the herniated discs in her cervical spine were due to an unrelated compressive disorder. Dr. Engstrand further opined that plaintiff sustained a sprain of the cervical spine, but that she also had pre-existing degenerative disc disease/spondylosis. In any event, Dr. Engstrand concluded that plaintiff had a mild, four percent impairment of the cervical spine and that she was not disabled.

Plaintiff testified to the effect that her car's air bags did not deploy as a result of the impact. She remained conscious after the accident and was not bleeding from any part of her body. When the police arrived, she refused medical attention. Plaintiff was able to drive her vehicle away from the scene of the accident and went home immediately afterwards. She had a prior accident on August 12, 2001, a "head-on" collision, in which she sustained neck and mid-back injuries and was hospitalized. Sometime after her prior accident, she had MRI studies which showed a small bulging disc at C5-6. She had been treating with a chiropractor, Jonathan Tepper, as a result of the prior accident and she continued to treat with him until sometime in 2004. Plaintiff had treated with a spine specialist in the 1990's for "scoliosis," and she admitted that her low back pain was the same as in the late 1990's. At the time of the instant accident, she was self-employed as an accountant working primarily out of her home office, however, she also regularly drove to different locales to meet her clients. She is still presently working as an accountant in the same capacity as before the accident. Plaintiff further testified that, as a result of the accident, she is not making a claim for a loss of income.

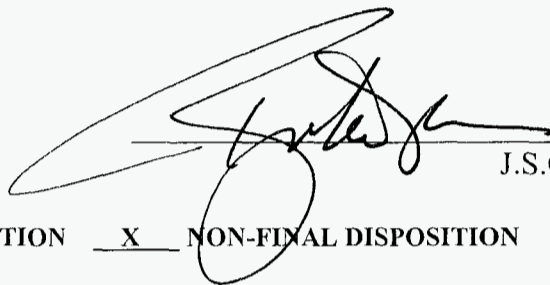
Defendant failed to make a prima facie showing that plaintiff did not sustain a serious injury in the category of a significant limitation (*see, Thomas v Smith*, 25 AD3d 786, 808 NYS2d 745 [2d Dept 2006]; *Smith v Delcore*, 29 AD3d 890, 814 NYS2d 554 [2d Dept 2006]; *Sano v Gorelik*, 24 AD3d 747, 805 NYS2d 854 [2d Dept 2005]). The opinions of defendant's examining physicians are inconsistent with their own findings of significant restrictions in the range of motion of the plaintiff's cervical spine and right shoulder when compared with the normal range. While Dr. Engstrand opined that plaintiff only sustained a mild impairment of the cervical spine, she found that plaintiff's cervical extension was limited by 30 degrees "due to guarding from pain". Additionally, Dr. Farkas found that there was a 20 degree difference between plaintiff's active right shoulder abduction as compared with the passive range of

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motion. These objectively measured, specifically-quantified restrictions raise triable issues of fact as to whether plaintiff sustained a significant limitation of her cervical spine and right shoulder (*see, Powell v Alade*, 31 AD3d 523, 818 NYS2d 600 [2d Dept 2006]; *Picott v Lewis*, 26 AD3d 319, 809 NYS2d 541 [2d Dept 2006]; *McDowall v Abreau*, 11 AD3d 590, 782 NYS2d 866 [2d Dept 2004]; *Lombardi v Columbo*, 259 AD2d 524, 684 NYS2d 896 [2d Dept 1999]). Furthermore, Dr. Farkas' finding that internal rotation of the right shoulder was to "L4 bilaterally," with normal being 160-170 degrees, lacks a meaningful comparison in the absence of specifically-quantified or qualified measurements (*see, Gerson v C.L.S. Transp.*, 37 AD3d 530, 829 NYS2d 688 [2d Dept 2007]; *McCauley v Vandina*, 21 AD3d 938, 801 NYS2d 62 [2d Dept 2005]). Accordingly, as defendant failed to meet his burden, the Court is not required to consider the sufficiency of the plaintiff's opposing papers (*see, Zamaniyan v Vrabeck*, 41 AD3d 472, 835 NYS2d 903 [2d Dept 2007]). Moreover since the Court has found the existence of triable issues of fact with respect to one category of serious injury, it need not consider whether the defendant's proof establishes a prima facie showing with respect to the other statutory categories (*see, Cesar v Felix*, 181 AD2d 852, 581 NYS2d 411 [2d Dept 1992]). Accordingly, defendant's motion for summary judgment dismissing the complaint is denied.

Dated: 007 16 2007


J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION