

Pineda v Ortiz

2007 NY Slip Op 33715(U)

November 13, 2007

Supreme Court, Suffolk County

Docket Number: 0007128/2005

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 8-20-07
ADJ. DATE 9-19-07
Mot. Seq. # 002 - MD
003 - XMD

-----X			CANNON & ACOSTA, LLP
JOSE PINEDA, LILIAN CATALAN PINEDA	:		Attorneys for Plaintiffs
and GABRIEL PINEDA, a minor by her mother	:		1923 New York Avenue
and legal guardian, LILIAN CATALAN PINEDA,	:		Huntington Station, New York 11746
	:		
	:	Plaintiffs,	
	:		ROBERT P. TUSA, ESQ.
	:		Attorneys for Defendants
- against -	:		898 Veterans Memorial Highway, Suite 320
	:		Hauppauge, New York 11788
	:		
JEANNETE D. ORTIZ and NORMA D. ORTIZ,	:		STEVEN J. SMETANA, ESQ.
	:		Attys for Lilian Catalan Pineda on Counterclaim
	:	Defendants.	201 North Service Road, Suite 303
-----X			Melville, New York 11747

Upon the following papers numbered 1 to 31 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 14; Notice of Cross Motion and supporting papers 15 - 19; Answering Affidavits and supporting papers ; Replying Affidavits and supporting papers 20 - 31; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendants Ortiz for summary judgment dismissing the first and second causes of action in the complaint on the ground that plaintiffs did not sustain a "serious injury" as defined in Insurance Law § 5102 (d), and this cross motion by Mrs. Pineda for summary judgment dismissing the first cause of action in the complaint and Mr. Pineda's counterclaim against her on the basis that he did not sustain a "serious injury" as defined in Insurance Law § 5102 (d), are both denied.

This is an action to recover damages for serious injuries allegedly sustained by plaintiffs as a result of a motor vehicle accident that occurred at or near the intersection of Third Avenue and Brentwood Road, Town of Islip, New York on September 26, 2004. The accident allegedly happened when the vehicle owned by defendant Norma D. Ortiz and operated by defendant Jeannete D. Ortiz collided with the vehicle operated by Mrs. Pineda, and in which Mr. Pineda and infant plaintiff Gabriel Pineda were riding in at the time of the accident. By order dated April 26, 2007 (Rebolini, J.) the third cause of action

in the complaint on behalf of infant plaintiff Gabriel Pineda was dismissed, without opposition, on motion of plaintiff on the counterclaim, Mrs. Pineda. Defendants Ortiz now move for summary judgment dismissing the first and second causes of action in the complaint on the ground that Mr. and Mrs. Pineda did not sustain a “serious injury” as defined in Insurance Law § 5102 (d). Mrs. Pineda, as a plaintiff on Jose Pineda’s counterclaim, now cross moves for summary judgment dismissing the first cause of action in the complaint on behalf of Mr. Pineda and Mr. Pineda’s counterclaim on the basis that he did not sustain a “serious injury” as defined in Insurance Law § 5102 (d).

CPLR 3212 (a) requires that a motion for summary judgment be made within 120 days after the filing of a note of issue, except with leave of court on good cause shown (*see*, CPLR 3212 [a]). Plaintiff on the counterclaim, Mrs. Pineda, made her cross motion on August 15, 2007, as indicated in her affidavit of service, which is about one and one-half months after June 30, 2007, the 120-day deadline following the filing of the note of issue thereby rendering this cross motion untimely (*see*, CPLR 3212 [a]; ***Brill v City of New York***, 2 NY3d 648, 781 NYS2d 261 [2004]). Notably, Mrs. Pineda did not seek leave to file a late motion for summary judgment in her notice of cross motion (*see e.g.*, ***Welch v City of Glen Cove***, 273 AD2d 302, 708 NYS2d 475 [2d Dept 2000]). In addition, counsel for Mrs. Pineda has not provided any explanation or “good cause” for serving her cross motion late, and thus, the Court has no discretion to entertain this cross motion on the merits (*see*, ***Brill v City of New York***, *supra*; ***Rivers v City of New York***, 37 AD3d 804, 830 NYS2d 767 [2d Dept 2007]). Further, a delay of one month or more is not minimal (*compare*, ***Miranda v Devlin***, 260 AD2d 451, 688 NYS2d 578 [2d Dept 1999][cross motion was made approximately five days after expiration of applicable 120-day period]). Moreover, assertions that no prejudice resulted from the delay since the action is not ready for trial and that the motion is meritorious are insufficient justifications to permit late filing (*see*, ***Gaines v Shell-Mar Foods, Inc.***, 21 AD3d 986, 801 NYS2d 576 [2d Dept 2005]). The Court notes, however, that this cross motion falls under the exception where a timely motion for summary judgment was made on nearly identical grounds and the issues are already properly before the Court (*see e.g.*, ***Grande v Peteroy***, 39 AD3d 590, 833 NYS2d 615 [2d Dept 2007], ***Bressingham v Jamaica Hosp. Med. Ctr.***, 17 AD3d 496, 793 NYS2d 176 [2d Dept 2005]; ***James v Jamie Towers Hous. Co.***, 294 AD2d 268, 743 NYS2d 85 [1st Dept 2002], *affd* 99 NY2d 639, 760 NYS2d 718 [2003]). Notably, the court, in the course of deciding the timely motion, is, in any event, empowered to search the record and award summary judgment to a nonmoving party (*see*, CPLR 3212 [b]).

Turning to the threshold issues, 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 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 nonmoving party, here, the plaintiff (*Cammarere v Villanova*, 166 AD2d 760, 562 NYS2d 808 [3d Dept 1990]).

In support of their motion and with respect to plaintiff Jose Pineda, defendants submit, inter alia, the pleadings; plaintiffs’ bill of particulars; the affirmed report of defendants’ examining radiologist, Alan B. Greenfield, M.D.; the affirmed report of defendants’ examining neurologist, Mathew M. Chacko, M.D.; and the affirmed report of defendants’ examining orthopedist, Vartkes Khachadurian, M.D. Plaintiffs claim, in their bill of particulars, that Mr. Pineda sustained sprains/strains of the cervical, thoracic and lumbar spine; cervical radiculopathy; and a disc bulge at L5-S1 with a protrusion narrowing the foraminal outlet. Additionally, plaintiffs claim that Mr. Pineda was confined to his bed for approximately two weeks and to his home for approximately three weeks. Plaintiffs further claim that Mr. Pineda sustained a serious injury in the categories of a permanent loss of use, a permanent consequential limitation, a significant limitation and a non-permanent injury.

In his report dated January 24, 2006, Dr. Greenfield states that he performed an independent radiological review of the MRI studies of Mr. Pineda’s lumbar spine dated November 8, 2004, and his findings include disc desiccation and dehydration at L5-S1; hypertrophy of the ligamentum flavum and/or facet joints at L5-S1; and a right paracentral broad based disc herniation at L5-S1 extending into the right neural foramen. Dr. Greenfield opined that these studies showed degenerative disc disease, degenerative Grade I anterior spondylolisthesis of L5-S1 and a normal lordosis. He further concluded that the right-sided disc herniation at L5-S1 could not be attributed to the accident with any reasonable medical certainty in light of the observed degenerative changes.

In his report dated October 13, 2006, Dr. Chacko states that he performed an independent neurological examination of Mr. Pineda on that date, and his findings include an unremarkable cranial nerve examination; DTR’s that were “2+”/symmetrical; normal muscle strength in the upper and lower extremities; no atrophy or fasciculations; a normal gait; and a straight leg raise at 80 to 90 degrees bilaterally. He observed that plaintiff’s active cervical flexion, extension, right/left lateral rotation and right/left lateral flexion were 50, 60, 80 and 45 degrees, with normal being 50, 60, 80 and 45 degrees. Dr. Chacko also noted, however, that plaintiff’s lumbar flexion, lateral flexion and extension were 45, 25 and

25 degrees, with normal being 60, 25 and 25 degrees. Furthermore, he noted that plaintiff complained of slight tenderness on palpation in the cervical and lumbosacral regions, although no muscle spasm was felt. Dr. Chacko opined that plaintiff had sustained causally related strains, but that there were no findings consistent with the presence of any cervical or lumbar radiculopathy. He also concluded that plaintiff was capable of performing the normal activities of his daily living and was not disabled.

In his report dated November 8, 2006, Dr. Khachadurian states that he performed an independent orthopedic examination of Mr. Pineda on October 13, 2006, and his findings include normal reflexes at the elbows, wrists, knees and ankles; a level pelvis; a normal/stable range of motion of all joints of the upper and lower extremities; an ability to heel/toe walk without difficulty; no spasm or shift of the cervical or lumbar spine; no evidence of radicular or referred pain in the cervical or lumbar spine; and a negative straight leg raising test at 70 degrees. He observed that plaintiff's flexion was from chin to chest which he opined was normal and that cervical extension, right/left rotation and right/left tilt were 70, 45 and 30 degrees, with normal being 70-80, 45 and 30 degrees. Additionally, he recorded that plaintiff's lumbar flexion, extension, right/left tilt and right/left rotation were 90, 30, 30 and 45 degrees, with normal being 90, 30, 30 and 45 degrees. Dr. Khachadurian opined that plaintiff sustained sprains of the cervical and lumbar spine which had resolved without any clinical evidence of a herniated disc, radiculitis or radiculopathy. He further concluded that there was no evidence of an orthopedic disability related to the accident and that plaintiff was capable of performing his usual work activities unrestricted.

In support of her cross motion, plaintiff on the counterclaim, Mrs. Pineda submits, among other things, the affirmation of counsel which adopts the factual and legal arguments set forth in the main motion as to Mr. Pineda. More specifically, counsel asserts that the first cause of action in the complaint as well as Mr. Pineda's counterclaim should be dismissed as he did not sustain a "serious injury" as defined by the no-fault law.

Defendants failed to make a prima facie showing that Mr. Pineda did not sustain a serious injury in the categories of a significant limitation and a nonpermanent injury (*see, McDonald v Pookie Hacking Corp.*, 37 AD3d 430, 829 NYS2d 616 [2d Dept 2007]; *LaCagnina v Bernard*, 34 AD3d 534, 824 NYS2d 161 [2d Dept 2006]; *Sayers v Hot*, 23 AD3d 453, 805 NYS2d 571 [2d Dept 2005]). At the outset, Dr. Chacko's observation of a 15 degree limitation in Mr. Pineda's lumbar flexion contradicts his conclusion that plaintiff did not sustain a serious injury within the meaning of the Insurance Law Section 5102 (d) (*see, Thomas v Smith*, 25 AD3d 786, 808 NYS2d 745 [2d Dept 2006]). Also, whereas Dr. Chacko considered 60 degrees to be the normal range of lumbar flexion, Dr. Khachadurian considered 90 degrees to be the normal (*see, Sanon v Moskowitz*, 2007 NY Slip Op 08057 [2d Dept 2007]). Additionally, Dr. Khachadurian's opinion that there was no clinical evidence of a herniated lumbar disc, contradicts the finding of Dr. Greenfield of a right paracentral herniated disc at L5-S1 based upon his review of plaintiff's MRI films (*see, Positko v Krawiec*, 6 AD3d 517, 774 NYS2d 395 [2d Dept 2004]). Further, defendants' motion papers did not adequately address plaintiffs' claim, clearly set forth in their verified bill of particulars, that Mr. Pineda sustained a medically determined injury or impairment of a nonpermanent nature (*see, Thai v Butt*, 34 AD3d 447, 824 NYS2d 131 [2d Dept 2006]). Defendants' examining neurologist and orthopedist conducted their independent examinations of plaintiff over one year after the accident. Neither expert related their findings concerning this category of serious injury for the period of time immediately following the

accident. Accordingly, as defendants failed to meet their burden, the Court is not required to consider the sufficiency of the plaintiffs' opposing papers (*see, Zamaniyan v Vrabeck*, 41 AD3d 472, 835 NYS2d 903 [2d Dept 2007]; *Thai v Butt, supra*). Moreover, since the Court has found the existence of triable issues of fact with respect to at least one category of serious injury, it need not consider whether the defendants' 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]).

In support of their motion and with respect to plaintiff Lilian Catalan Pineda, defendants submit, inter alia, plaintiffs' bill of particulars; the affirmed report of defendants' examining radiologist, Alan B. Greenfield, M.D.; the affirmed report of defendants' examining neurologist, Mathew M. Chacko, M.D.; and the affirmed report of defendants' examining orthopedist, Vartkes Khachadurian, M.D. Plaintiffs claim, in their bill of particulars, that Mrs. Pineda sustained a lumbosacral sprain and an L5-S1 disc herniation. Additionally, plaintiffs claim that Mrs. Pineda was confined to her bed for approximately one week and to her home for approximately two weeks. Plaintiffs further claim that Mrs. Pineda sustained a serious injury in the categories of a permanent loss of use, a permanent consequential limitation, a significant limitation and a non-permanent injury.

In his report dated July 6, 2005, Dr. Greenfield states that he performed an independent radiological review of the MRI studies of Mrs. Pineda's lumbar spine, and his findings include a normal lordotic curve; disc dessication at L5-S1 with anterior spurs; a shallow central disc herniation indenting the epidural fat; diffusely patent neural foramina; and mild degenerative hypertrophy of the ligamentum flavum and/or facet joints at L5-S1 on both sides. He opined that these studies showed mild degenerative changes which were unrelated to the accident. He further concluded that the shallow central disc herniation at L5-S1 could not be attributed to the accident with any reasonable medical certainty as it was indenting only the anterior fat and not deforming the dural sac in anyway.

In his report dated December 1, 2006, Dr. Chacko states that he performed an independent neurological examination of Mrs. Pineda on that date and his findings include DTR's that were "2+" /symmetrical; normal strength and tone in the lower extremities with no atrophy or fasciculations; a normal sensory examination; a negative straight leg raising test bilaterally; no tenderness or muscle spasm on palpation to the lumbar region; and a normal gait. He also observed that plaintiff's lumbar flexion, lateral flexion, and extension were 45, 25 and 25 degrees, with normal being 60, 25 and 25 degrees. Additionally, he recorded that plaintiff was not working at the time of the accident and that she was not working at the time of his examination. Dr. Chacko opined that plaintiff sustained a lumbar strain which had objectively resolved and that there were no findings consistent with the presence of any radiculopathy. Furthermore, he concluded that plaintiff was capable of performing the normal activities of her daily living and that she was not disabled.

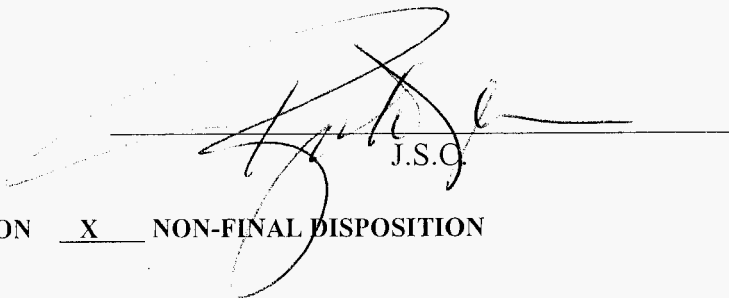
In his report dated December 16, 2006, Dr. Khachadurian states that he performed an independent orthopedic examination of Mrs. Pineda on December 1, 2006, and his findings include normal and stable joints of the lower extremities; an ability to heel/toe walk without difficulty; no palpable or visible spasm of the paraspinal region of the lumbar spine; and a level pelvis. He also noted that plaintiff's lumbar forward flexion, backward extension, right/left tilt and right/left rotation were 90, 30, 30 and 45 degrees, with the normal ranges being 90, 30, 30 and 45 degrees. Dr. Khachadurian opined that plaintiff had sustained a lumbar sprain, but that there was no clinical

Pineda v Ortiz
Index No. 05-7128
Page No. 6

evidence of a herniated disc, radiculitis or radiculopathy. Additionally, he concluded that there was no evidence of an ongoing orthopedic disability related to the accident.

Defendants failed to make a prima facie showing that Mrs. Pineda did not sustain a serious injury in the category of a significant limitation (*see, Mullen v Lauffer*, 31 AD3d 402, 820 NYS2d 61 [2d Dept 2006]; *Volpetti v Kap*, 28 AD3d 750, 814 NYS2d 236 [2d Dept 2006]; *Sano v Gorelik*, 24 AD3d 747, 805 NYS2d 854 [2d Dept 2005]). Initially, Dr. Chacko's observation of a 15 degree limitation in Mrs. Pineda's lumbar flexion contradicts his conclusion that plaintiff did not sustain a serious injury within the meaning of the Insurance Law Section 5102 (d) (*see, Thomas v Smith, supra; Kaminsky v Waldner*, 19 AD3d 370, 796 NYS2d 175 [2d Dept 2005]). Also, whereas Dr. Chacko considered 60 degrees to be the normal range of lumbar flexion, Dr. Khachadurian considered 90 degrees to be the normal (*see, Sanon v Moskowitz, supra*). Further, Dr. Khachadurian's opinion that there was no clinical evidence of a herniated lumbar disc, contradicts the finding of Dr. Greenfield of a central herniated disc at L5-S1 based upon his review of plaintiff's MRI films (*see, Trantel v Rothenberg*, 286 AD2d 325, 729 NYS2d 158 [2d Dept 2001]). Under these circumstances, the Court is not required to consider the sufficiency of the plaintiffs' opposing papers (*see, Smith v Delcore*, 29 AD3d 890, 814 NYS2d 554 [2d Dept 2006]; *see also, Cesar v Felix, supra*). Accordingly, the motion and the cross motion for summary judgment are denied.

Dated: NOV 13 2007



J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION