

Victor v Thomas

2008 NY Slip Op 30071(U)

January 7, 2008

Supreme Court, Suffolk County

Docket Number: 0024544/2005

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 9-7-07
ADJ. DATE 10-31-07
Mot. Seq. # 001 - MG

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Plaintiffs,	:	Huntington Station, New York 11746
	:	
- against -	:	
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Upon the following papers numbered 1 to 22 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 14; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 15 - 19; Replying Affidavits and supporting papers 20 - 22; 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 first cause of action of the complaint on the grounds that plaintiff Alexandra Victor 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 plaintiffs on December 23, 2004 when the vehicle owned and operated by the then 22 year old plaintiff Alexandra Victor, in which her sister, plaintiff Myrlene Victor, was a front seat passenger was struck by a vehicle operated by defendant Randall K. Thomas that made a left turn in front of plaintiffs' vehicle near 646 Route 112 in Brookhaven, New York. By their complaint, plaintiffs allege a first cause of action on behalf of plaintiff Alexandra Victor and a second cause of action on behalf of plaintiff Myrlene Victor to recover damages for serious injuries as defined in Insurance Law § 5102 (d) allegedly sustained as a result of the subject accident.

By their bill of particulars, plaintiffs allege that as a result of the subject accident, plaintiff Alexandra Victor sustained the following injuries, transitional L5 vertebrae, cervical scoliosis, loss of normal cervical lordosis, ceracic scoliosis, straightening of the cervical curvature, cervical sprain and

strain, lumbosacral sprain and strain, and closed head injury. In addition, plaintiffs allege that plaintiff Alexandra Victor was treated and released from the emergency room of Brookhaven Memorial Hospital the day of the accident and one day thereafter and that plaintiff was confined to bed for approximately one month and confined to home for approximately two and a half months and was totally disabled for approximately two and a half months. At the time of said accident, plaintiff Alexandra Victor was employed as a Certified Nurse's Aid at Medford Multicare Center.

Defendants now move for summary judgment dismissing solely the first cause of action on behalf of plaintiff Alexandra Victor on the grounds that she did not sustain a "serious injury" as defined in Insurance Law § 5102 (d). In support of their motion, defendants submit, among other things, the summons and complaint; defendants' answer; plaintiffs' bill of particulars; the emergency room records of plaintiff Alexandra Victor; the deposition transcript of plaintiff Alexandra Victor; the affirmed report dated September 8, 2006 of defendants' examining orthopedist, Joseph P. Stubel, M.D. (Dr. Stubel), based on his orthopedic evaluation of plaintiff Alexandra Victor on said date; the affirmed report dated August 16, 2006 of defendants' examining neurologist, Richard A. Pearl, M.D. (Dr. Pearl), based on his neurological examination of plaintiff Alexandra Victor one day prior; and a note from plaintiff's treating chiropractor, Nicholas Martin, D.C., of Brentwood Chiropractic Associates indicating that plaintiff could return to work full duty on March 1, 2005.

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 objective evidence of the extent, percentage or degree of the limitation or loss of range of motion and its duration based on a recent examination of the plaintiff must be provided 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 (*see, Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 746 NYS2d 865 [2000]; *Mejia v DeRose*, 35 AD3d 407, 825 NYS2d 722 [2d Dept 2006]).

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 nonmoving

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

At her deposition, plaintiff Alexandra Victor testified that after defendant's vehicle struck her vehicle her forehead and chest hit the steering wheel, the airbags deployed and her knees and the entire left side of her body, her right elbow, ankle and right wrist were injured. In addition, plaintiff testified that at the emergency room after the accident she complained of head injury, headaches and chest pain. Plaintiff testified that at the emergency room she was given a neck brace which she wore for four to five months. She explained that she returned to the emergency room the next day because her upper chest and face had swollen and she had blurry vision. According to plaintiff, about two days later, she went to see a chiropractor, Dr. Martin, at Brentwood Chiropractic Association. Plaintiff also testified that she initially went to the chiropractor's office five days per week for about two months then the frequency of her visits decreased to four days per week for about one to two months and then the frequency decreased to three days per week until she stopped her visits in August or October of 2005 four or five months after she became pregnant and that she never returned to the chiropractor again. According to plaintiff, about one month after the accident's occurrence, she was referred by Dr. Martin to a physician at South Island Medical whom she saw "a couple of times." Plaintiff stated that the last time she sought treatment for her injuries from the subject accident was October 2005. Plaintiff testified that her son, her only child, was born in April 2006. At the time of the accident, plaintiff had been working full time for Medford Multicare Center as a Certified Nurse's Aid and plaintiff testified that as a result of her injuries from said accident she lost "about three months" from work. According to plaintiff, she returned to her same job full time after those three months and performed the same duties but with difficulty. Plaintiff also testified that she had injured her back prior to the subject accident, once at work and once in a prior motor vehicle accident in 2000.

Defendants' examining orthopedist, Dr. Stubel, indicated in his affirmed report that when he performed his examination of plaintiff Alexandra Victor approximately one year and eight months after the subject accident, plaintiff reported that she currently had neck and back pain and that she was employed as a certified nursing assistant and missed three months of work then returned to work but was currently on maternity leave. Dr. Stubel listed plaintiff's bill of particulars as one of the records that he reviewed. He provided the results of his physical examination of plaintiff's cervical spine, noting that there was no reported tenderness on palpation and no palpable trigger points or muscle spasm. Dr. Stubel added that his probing of the cervical nerve roots produced no symptoms down the arms bilaterally. His range of motion testing findings for plaintiff's cervical spine were as follows: extension to 45 degrees (normal 45 degrees), flexion to 45 degrees (normal 45 degrees), rotation to 80 degrees bilaterally (normal 80 degrees), and lateral flexion to 45 degrees bilaterally (normal 45 degrees). Dr. Stubel also indicated that plaintiff's biceps, triceps and brachioradialis reflexes were bilaterally symmetrical and 2+; pinprick sensation and motor strength were grossly normal in the upper extremities; and that Tinel's sign was negative at both carpal tunnels and both cubital tunnels. With respect to his examination of plaintiff's lumbar spine, Dr. Stubel indicated that there was no reported tenderness and no palpable muscle spasm. Dr. Stubel provided range of motion testing results, forward bending to 90 degrees (normal 90 degrees), lateral flexion to 30 degrees (normal 30 degrees) bilaterally, and lateral rotation to 60 degrees (normal 60 degrees) bilaterally. Dr. Stubel noted that plaintiff's straight leg raising was to 80 degrees (normal 80 degrees) bilaterally with no complaints of pain and that plaintiff's reflexes at the Achilles and patella tendons were bilaterally symmetrical and 2+. In conclusion, Dr. Stubel diagnosed neck and lower back sprains and opined that the subject accident had a causal relationship to the described symptoms. According to Dr. Stubel, plaintiff exhibited no objective signs of disability with reference to the subject accident and alleged injuries and he

felt that no further orthopedic treatment or physical therapy treatment was required. Dr. Stubel further opined that plaintiff could perform her usual activities of daily living and her usual work.

Dr. Pearl, defendants' examining orthopedist, examined plaintiff Alexandra Victor about one year and eight months after the subject accident and indicated in his affirmed report that plaintiff was alert and oriented; that she could spell, calculate and follow commands well; and that her cranial nerve functions were intact including, fundi, pupils, extraocular movements, facial strength and sensation, jaw, uvula and tongue movements. In addition, Dr. Pearl's other findings included 5/5 motor examination in all extremities with normal tone; no Babinski sign; no atrophy or fasciculations noted; and sensory examination intact to pinprick, light touch, vibration, and joint position sense. Dr. Pearl reported that plaintiff's Romberg test was negative; no tremors were noted; cerebellar was intact; Tinel's sign was negative at plaintiff's wrists and elbows; and that her gait was normal. As for range of motion testing results, Dr. Pearl found that plaintiff's cervical spine flexion was 60 degrees (60 degrees normal), extension was 0 to 75 degrees (0 to 75 degrees normal), and lateral rotation was 80 degrees (80 degrees normal). His results for range of motion testing for plaintiff's lumbar spine was 80 degrees flexion (80 degrees normal), 25 degrees extension (25 degrees normal), and 30 degrees lateral bending (30 degrees normal). He added that plaintiff's straight leg raising was negative and that no paravertebral tenderness or spasm was noted in the cervical, dorsal or lumbosacral spine. Dr. Pearl diagnosed cervical and lumbosacral sprain and opined that there were no objective neurological findings to indicate neurological injury or the need for neurological healthcare, testing or disability.

Here, defendants established that plaintiff Alexandra Victor did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) through the submission of the affirmed medical report of their expert orthopedist, who conducted a physical examination of the plaintiff, finding a normal range of motion in her cervical and lumbar regions of the spine and the absence of any orthopedic disability as well as the affirmed medical report of their expert neurologist (*see, Rodriguez v Huerfano*, ___ NYS2d ___, 2007 WL 4462935, 2007 NY Slip Op 10134 [NYAD 2 Dept Dec 18, 2007]). In addition, defendants demonstrated that plaintiff did not satisfy the last category of "serious injury" under Insurance Law § 5102 (d) inasmuch as plaintiff's treating chiropractor indicated in his note dated February 28, 2005 that plaintiff could return to work full duty on March 1, 2005, about two months and one week after the subject accident, which corresponded with plaintiff's allegation in her bill of particulars that she was totally disabled for approximately two and a half months (*see, Insurance Law § 5102 [d]*).

To defeat the defendants' motion, plaintiff was required to come forward with competent admissible medical evidence, based on a recent examination and objective findings, sufficient to verify her 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 plaintiff's medical treatment and the physical examination conducted by her 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 plaintiff Alexandra Victor did sustain a "serious injury" as defined in Insurance Law § 5102 (d). In his affirmation, plaintiffs' attorney contends that defendants failed to make a prima facie showing inasmuch as defendants' examining physicians used different numbers to denote normal for range of motion testing; Dr. Stubel did not state "affirmed" as part of the affirmation of his report; and Dr. Stubel did not address the last "serious injury" category of

Insurance Law § 5102 (d)¹. In support of their opposition to the motion, plaintiffs submit photographs of alleged damage to plaintiff's vehicle; plaintiff's deposition transcript; and the sworn affidavit dated October 3, 2007 of plaintiff's treating chiropractor, Nicholas Martin, D.C. (Dr. Martin).

In reply, defendants point to deficiencies in plaintiff's treating chiropractor's affidavit, the failure to address the significance of plaintiff's two prior accidents that resulted in her back injuries as well as pre-existing congenital conditions allegedly revealed in plaintiff's cervical MRI study of February 7, 2005. Defendants contend that said deficiencies render speculative Dr. Martin's conclusions that plaintiff has permanent limitations of her cervical spine caused by the subject accident. Defendants also find plaintiffs' opposition to be inadequate inasmuch as plaintiff failed to provide an adequate explanation for the two year gap in treatment with her chiropractor between the date that she ceased treatment, October 5, 2005, and the date that she returned for an examination, September 17, 2007, in order to oppose the instant motion. In support of the reply, defendants submit a copy of the MRI report dated February 9, 2005 of plaintiff's cervical spine².

With respect to plaintiffs' opposition, the Court notes that although plaintiff Alexandra Victor testified that she lost "about three months" from work following the subject accident, she alleged in her bill of particulars that she was totally disabled for approximately two and a half months, which did not satisfy the last "serious injury" category under Insurance Law § 5102 (d) and did not require defendants' examining physicians to relate their medical findings to this category of serious injury (*compare, Monkhouse v Maven Limo, Inc.*, 44 AD3d 630, ___ NYS2d ___, 2007 WL 2875750, 2007 NY Slip Op 07412 [NYAD 2 Dept Oct 02, 2007]). In addition, Dr. Stubel's report was properly affirmed pursuant to CPLR 2106 (*see, CPLR 2106*). Moreover, the fact that defendants' examining physicians deemed different numerical standards to be normal for range of motion testing did not, standing alone, raise an issue of fact given that both physicians provided measured findings in comparison to normal for all relevant ranges of motion and plaintiff's results were all normal (*compare, Sanon v Moskowitz*, 44 AD3d 926, 843 NYS2d 510 [2d Dept 2007]).

By his affidavit, plaintiff's treating chiropractor, Dr. Martin, stated that he first saw plaintiff on December 27, 2004 and that on that initial visit plaintiff had positive test results with respect to the Distraction Test, Heel Walk Test and Toe Walk Test as well as significant restrictions of the cervical spine on range of motion testing and a complete inability to perform any range of motion testing of the lumbar spine due to pain. He described his treatment of plaintiff as being on a regular basis using a variety of chiropractic modalities including cervical and lumbar spine adjustments and heat therapy. Dr. Martin added that he provided plaintiff with orthopedic supports to her neck and lower back region. He provided range of motion testing results for plaintiff's cervical and lumbar spine on March 31, 2005. He indicated that he treated plaintiff until December 18, 2006, stating that plaintiff's pregnancy was interfering with her treatment and that she stopped treating at that time. Dr. Martin further indicated that he re-examined plaintiff on September 17, 2007, noting that she still had neck stiffness and low back pain. He reported

¹Plaintiffs' attorney does not provide any law to support these contentions.

²The Court did not consider the MRI report dated February 9, 2005 submitted by defendants in their reply papers since it constituted new matter that should have been included as part of the motion papers to establish that plaintiff had pre-existing congenital conditions of the cervical spine (*see, CPLR 2214 [c]; Wosyluk v L.T.L. Developers, Inc.*, 147 AD2d 475, 538 NYS2d 478 [2d Dept 1989]).

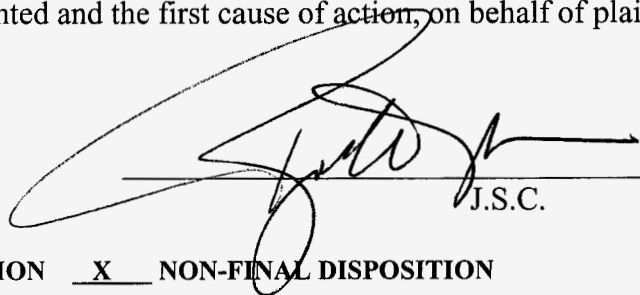
that upon re-examination plaintiff had positive Cervical Compression Test results and that she had restrictions in cervical range of motion testing with cervical flexion at 40 degrees (60 degrees normal), extension at 30 degrees (50 degrees normal), left rotation at 60 degrees (80 degrees normal), right rotation at 50 degrees (80 degrees normal), left lateral flexion at 30 degrees (40 degrees normal), and right lateral flexion 20 degrees (40 degrees normal). Plaintiff's lumbar range of motion testing also revealed restrictions with lumbar flexion at 70 degrees (90 degrees normal), extension at 20 degrees (30 degrees normal), left rotation at 25 degrees (30 degrees normal), right rotation at 20 degrees (30 degrees normal), left lateral flexion at 10 degrees (20 degrees normal), and right lateral flexion at 10 degrees (20 degrees normal). Dr. Martin diagnosed cervical and lumbosacral derangement and opined that given her continuing symptomology he believed that plaintiff had sustained a significant limitation to her cervical and lumbosacral spine as a direct result of the subject motor vehicle accident.

Here, plaintiff's chiropractor failed to acknowledge or account for plaintiff's two prior accidents, one at work and one involving a motor vehicle, which resulted in injuries to her back as testified to by plaintiff during her deposition (see, *Pazmino v Universal Distributors, LLC*, ___ AD3d ___, 845 NYS2d 401 [2d Dept 2007]; *Moore v Sarwar*, 29 AD3d 752, 816 NYS2d 503 [2d Dept 2006]; see also, *Franchini v Palmieri*, 1 NY3d 536, 775 NYS2d 232 [2003]). By his statement that "[a]s per history she was asymptomatic prior to the accident and I believe that the motor vehicle accident that she had on December 23, 2004 are [sic] producing her symptoms," it appears that Dr. Martin merely took plaintiff's word that she was asymptomatic before the subject accident and there is nothing in his affidavit to indicate that he reviewed, or attempted to review, any medical records from the prior accidents (see, *Vidor v Davila*, 37 AD3d 826, 830 NYS2d 772 [2d Dept 2007]). Thus, Dr. Martin's conclusions that the injuries to plaintiff's spine were caused by the subject accident were rendered speculative (see, *Franchini v Palmieri, supra*; *Pazmino v Universal Distributors, LLC, supra*; *Vidor v Davila, supra*; *Moore v Sarwar, supra*). In addition, although Dr. Martin explained the reason for plaintiff's cessation of treatment as due to her pregnancy,³ he did not explain the gap in his treatment of plaintiff, that is, her failure to resume treatment from the time of plaintiff's son's birth in April 2006 to Dr. Martin's re-examination of plaintiff on September 17, 2007 (see, *Pommells v Perez, supra*; *Phillips v Zilinsky*, 39 AD3d 728, 834 NYS2d 299 [2d Dept 2007]).

Plaintiffs also failed to submit competent medical evidence that plaintiff Alexandra Victor was unable to perform substantially all of her daily activities for not less than 90 of the first 180 days following the subject accident (see, *Moore v Sarwar, supra*).

Accordingly, the instant motion is granted and the first cause of action, on behalf of plaintiff Alexandra Victor, is dismissed.

Dated: JAN 07 2008



J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION

³Notably, Dr. Martin indicates in his affidavit that plaintiff stopped treatment on December 18, 2006 because her pregnancy was interfering with her treatment whereas plaintiff testified that her treatment ended one year before in October 2005, when she was four or five months pregnant.