

Portalatin v Matuszak

2008 NY Slip Op 32241(U)

June 24, 2008

Supreme Court, Nassau County

Docket Number: 0565-07/

Judge: Karen V. Murphy

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**SUPREME COURT – STATE OF NEW YORK
TRIAL TERM, PART 22 NASSAU COUNTY**

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

_____ x

LEDIA PORTALATIN,

Plaintiff(s),

-against-

**EVA A. MATUSZAK and
TADEUSZ MATUSZAK,**

Defendant(s).

_____ x

Index No. 000565/07

Motion Submitted: 2/14/08

Motion Sequence: 001

The following papers read on this motion:

- Notice of Motion/Order to Show Cause.....X
- Answering Papers.....X
- Reply.....X
- Briefs: Plaintiff's/Petitioner's.....
- Defendant's/Respondent's.....

Defendants move this Court for an order granting summary judgment in their favor in that Plaintiff did not suffer a serious injury as that term is defined by the Insurance Law. Plaintiff opposes the requested relief.

The instant action involves an automobile accident, which occurred on September 18, 2006 at and about the intersection of the Belt Parkway and Guy Brewer Blvd. in Queens County, New York. It is alleged in the Bill of Particulars dated April 20, 2007, that Plaintiff suffered permanent and serious injuries as a result of Defendant's negligent operation of the motor vehicle. According to the Bill of Particulars, Plaintiff suffered "straightening of the cervical curvature with multilevel disc desiccation, disc bulging, bony ridging, disc herniation with left neural foraminal narrowing at C3 – C4 and C4 – C5, tenderness along

the sternocleidomastoid and the paraspinal muscles in the trapezius on the left side, right AC separation, right biceps tendonitis, pain with internal rotation of the right shoulder, Cervicalgia, neck sprain, pain with extension and lateral bending of the cervical spine, and pain into the shoulder with the Spurling test.”

According to her sworn deposition testimony, at the time of the accident Plaintiff had been employed as Community Business Director for Atria Senior Living Group. Plaintiff worked there for approximately four years before the subject accident. After the accident, Plaintiff testified that she continued to work full time with the exception of the time spent in the emergency room on the day of the accident.

Plaintiff did not seek medical attention at the scene immediately after the accident, and did not request to be taken by ambulance to a hospital. Immediately following the accident, Plaintiff complained of a headache as well as neck and shoulder pain. Plaintiff’s husband arrived on the scene of the accident and took her to work. Upon arrival at her place of employment, Plaintiff continued to make subjective complaints of pain. After two hours, Plaintiff was taken home by a fellow employee because she wanted to go to the emergency room. Her husband drove her to the Emergency Room at South Nassau Community Hospital where she received x-rays of her shoulder and neck. The x-rays revealed that Plaintiff had a neck and shoulder sprain. She was released from the hospital the same day and was given Advil and Tylenol for the pain. The hospital referred Plaintiff to Orlin & Cohen Orthopedic Associates, LLP where she was initially examined by Dr. Bradley Gerber on September 23, 2006. Plaintiff was then referred by Dr. Gerber for physical therapy to be received through Orlin & Cohen Orthopedic Associates, LLP. She was instructed to continue taking anti-inflammatories and was prescribed Skelaxin for her “discomfort.”

Plaintiff further testified at her deposition that she received physical therapy for “a couple of weeks” through Orlin & Cohen Orthopedic Associates, LLP. She stopped physical therapy in October 2006 for insurance reasons. It is unclear exactly how long Plaintiff continued physical therapy. She attended a follow up visit with Dr. Gerber on October 12, 2006 at which time he ordered an MRI of Plaintiff’s neck. On October 13, 2006, Dr. Steve Sharon conducted an MRI of Plaintiff’s cervical spine. Plaintiff then again saw Dr. Gerber for a follow up visit on October 26, 2006. Plaintiff also saw Dr. Bret Ostrager, her primary care physician, after the accident beginning in June 2007. She was later evaluated by Defendant’s examining physician Dr. Harold Kozinn on October 4, 2007.

Plaintiff further testified that as a result of the accident, her injuries affected the way she worked only while using the computer and picking up the phone. However, she stated that besides the hours she missed on the day of the accident, she did not miss any other time from work as a result of this accident. She further described how she exercises and rides her bicycle less often due to her injuries. At the time of her deposition, August 29, 2007, Plaintiff described continued pain in her neck, which she occasionally treats with Advil or Tylenol.

At the deposition she also indicated that she experienced numbness in her neck radiating down her left arm beginning in July 2007 for which she plans to see a neurologist. There is nothing before this court to prove such plans were acted upon.

It is well recognized that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact. (*Andre v. Pomeroy*, 35 N.Y.2d 361, 320 N.E.2d 853, 362 N.Y.S.2d 131 [1974]). Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact. (*Nassau Diag. Imag. & Radiation Oncology Assoc. v. Winthrop University Hosp.*, 197 A.D.2d 563, 602 N.Y.S.2d 650 [2d Dept., 1993]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party, herein the Plaintiff. (*Makaj v. Metropolitan Transportation Authority*, 18 A.D.3d 625, 796 N.Y.S.2d 621 [2d Dept., 2005]).

The Defendants must in the first instance establish their prima facie entitlement as a matter of law by demonstrating that the Plaintiff did not sustain a serious injury within the meaning of Insurance Law Section 5102(d) as a result of this accident. (*Felix v. New York City transit Auth.*, 32 A.D.3d 527, 819 N.Y.S.2d 835 [2d Dept., 2006]). This Court is satisfied that they have met this threshold requirement.

The Insurance Law defines serious injury to mean, in relevant part, a personal injury, which results in "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 customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment." Insurance Law Section § 5102(d).

In support of the Defendants' motion for summary judgment, they submit a sworn affidavit from Board Certified Orthopedic Surgeon Dr. Harold Kozinn. According to his October 4, 2007 sworn report, Dr. Kozinn examined the Plaintiff in relation to the neck and shoulder pain she experienced. At that time, Plaintiff complained that the pain in her neck was more severe. Plaintiff did not want to move her neck during the examination so Dr. Kozinn could not perform an objective test to determine the range of motion of her neck. However, he reported that he performed other objective tests to determine the range of motion of her shoulders. According to his report, the range of motion was normal. In addition, Dr. Kozinn reviewed the earlier reports of Dr. Gerber and Dr. Sharon as well as the MRI and found no reported disc herniation and no decreased range of motion in the shoulders. Plaintiff complained of pain with even the slightest touch to her neck and shoulders. She also stated that she could not move her extremities, but Dr. Kozinn noted that she was able to move them freely when discussing her medical history. After this

examination, although Dr. Kozinn found significant symptom magnification, there were no objective positive physical findings. He diagnosed her symptoms as a cervical sprain and a contusion of the shoulder. Ultimately, he determined that no further treatment relating to the accident was required.

Defendant also submitted the duly sworn reports of Dr. Bradley Gerber. According to the January 21, 2008 sworn report, Plaintiff was examined by Dr. Gerber on September 23, 2006. At that time, she made subjective complaints of neck and right shoulder pain. Dr. Gerber examined Plaintiff's cervical spine and right shoulder and conducted certain objective tests. Upon completion of those tests, Dr. Gerber found that the Plaintiff had a normal range of motion, that the Spurling, Hawkins and Neer tests were negative, and that there was "some" pain and tenderness in the neck and shoulder. Dr. Gerber diagnosed the Plaintiff with a neck and shoulder sprain. He found it would be beneficial for Plaintiff to receive physical therapy for her neck and shoulder.

Dr. Gerber saw Plaintiff again for a follow up of her neck and right upper extremity pain on October 12, 2006. He found that there were no clonus, Tinel, Babinski, or Hoffmann signs, that there was pain with the Spurling test, and that there was mild pain with the Hawkins test. After the examination, Dr. Gerber ordered Plaintiff to receive an MRI of her neck to rule out a herniated disk as a result of her motor vehicle accident. He also instructed Plaintiff to continue physical therapy and to occasionally take anti-inflammatories for "discomfort."

Upon Dr. Gerber's third examination of Plaintiff, he reported that her radicular symptoms had mostly resolved; however, he recommended that Plaintiff continue physical therapy for her neck and the spasm in the left paraspinals, trapezius and strap muscles. She was also advised by Dr. Gerber that she could be active as tolerated.

In considering the medical reports of Dr. Gerber and Dr. Kozinn, this Court is satisfied that Defendants proved that the Plaintiff did not sustain a serious injury under the "permanent consequential limitation of use of a body organ or member" theory. (*Insurance Law Section § 5102[d]*). The reports from Dr. Kozinn and Dr. Gerber indicated that Plaintiff reported subjective complaints of pain in her neck and shoulder. However, both reports also indicated that her injuries were mild sprains of the neck and shoulder. In Dr. Kozinn's report, he found that the range of motion of Plaintiff's shoulder was normal. Although Plaintiff did not allow Dr. Kozinn to perform a range of motion test on her neck, previous tests conducted by Dr. Gerber reveal that her range of motion was normal. Dr. Kozinn concluded that Plaintiff no longer required treatment for her injuries, thus finding that Plaintiff's injuries did not constitute a permanent limitation.

Dr. Gerber's reports further establish the Plaintiff did not suffer a serious injury. Dr. Gerber describes Plaintiff's injuries as slight, amounting to what he concluded to be a sprain

or strain. During the follow up visits, he determined that Plaintiff's condition was improving. Moreover, approximately a month after the instant accident occurred, Dr. Gerber reported that her symptoms had almost completely resolved. By her last visit to Dr. Gerber, Plaintiff was instructed that she could be active as tolerated. It was also around this time that Plaintiff had ceased attending physical therapy sessions. Dr. Gerber's reports provide evidence that her symptoms were not permanent in duration, but were, in fact, subsiding. Although Plaintiff still complained of pain, the reports dictate that she had made significant progress from the time of the accident. The reports never established that the injuries Plaintiff incurred were permanent in nature. Rather, those reports established that her injuries were temporary and could be resolved through physical therapy.

Although there is little doubt that the Plaintiff did experience pain and discomfort as a result of the accident, this Court finds that such pain was mild. It is well recognized that slight or minor pain, tenderness or sprain in the neck and shoulder areas does not constitute a "serious injury" within the meaning of the Insurance Law. (See, *Coughlan v. Donnelly*, 172 A.D.2d 480, 567 N.Y.S.2d 835 [2d Dept., 1991]). The reports from Dr. Gerber and Dr. Kozinn prove the Defendants assertion that Plaintiff did not suffer a serious injury resulting from a permanent consequential limitation of use of a body organ or member.

The documents submitted by the Defendants supporting their motion also prove that the Plaintiff did not suffer a serious injury under the theory that the Plaintiff sustained a "significant limitation of use of a body function or system." (*Insurance Law 5102[d]*). The Court recognizes that a "significant limitation of use of a body organ or member" is construed to mean something more than a minor limitation. (See, *Joseph v. Forman*, 16 Misc.3d 743, 838 N.Y.S.2d 902, 2007 N.Y. Slip Op. 27245 [N.Y. Sup. 2007]). The diagnoses from Plaintiff's examination at Nassau Community Hospital on the day of the accident, by Dr. Gerber, and by Dr. Kozinn all show that she sustained a sprain of her neck and shoulder. A sprain does not qualify as a significant limitation and, accordingly, it cannot constitute a serious injury. Based on the aforementioned reports of Dr. Gerber and Dr. Kozinn, it is evident to this Court that the Plaintiff sustained neither a permanent nor a significant limitation of a body function or system. The Defendants have produced sufficient documentation to prove that Plaintiff sustained only a minor or slight limitation; thus, her injuries must be construed as insignificant.

In further support of the motion for summary judgment, the Defendants highlight Plaintiff's own testimony during the examination before trial. According to her sworn Deposition, Plaintiff had been working in her regular capacity since the day after the accident and was not disabled from this occupation. She did complain of some pain while answering the phone and using the computer at her job. She further testified that no other social activities had been curtailed as a result of the injuries she sustained from the accident. During the Deposition, Plaintiff was asked for examples of how her injuries from the accident have affected her daily life. There is no testimony in the record where Plaintiff indicates that her

injuries prevented her from such customary daily activities as dressing herself, performing household chores, going to work. Plaintiff did state that due to the pain in her neck and shoulder she was unable to ride her bicycle with the same frequency and intensity. Prior to the accident Plaintiff would ride her bicycle everyday. However, she testified that her injuries from the accident caused her to ride her bicycle one day per week.

In considering the meaning of this theory, the Court adheres to the opinion in *Licari*, “that the words ‘substantially all’ should be 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. Elliot*, 57 N.Y.2d at 236, 441 N.E.2d at 1091, 455 N.Y.S.2d at 573 [1982]). The Deposition testimony submitted by the Defendants demonstrates that the Plaintiff did not incur 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 customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment. Plaintiff’s testimony clearly indicates that she was not hindered from performing her everyday activities for the ninety day period. She continued to go to work during the ninety days immediately following the accident. In addition, she was able to perform “substantially all” of her daily activities. Although Plaintiff experienced a diminution in her capacity to exercise and ride her bicycle, this is the only activity Plaintiff states she was prevented from doing. A limitation such as that is slight and does not fall within the definition of a serious injury as required by the statutory provision. (*Licari v. Elliot*, 57 N.Y.2d 230, 455 N.Y.S.2d 570 [1982]).

The Court finds, as a matter of law, that the defendants have submitted evidence in admissible form to make a “prima facie showing of entitlement to judgment as a matter of law” that the Plaintiff did not sustain a serious injury. Accordingly, the burden has shifted to the plaintiff to establish such an injury and to raise a triable issue of fact. (See, *Gaddy v. Eycler*, 79 N.Y.2d 955, 582 N.Y.S.2d 990 [1992]). This Court finds that she has failed to do so.

In opposition to the motion for summary judgment, Plaintiff submitted her Deposition testimony to establish that she had raised a triable issue of fact. Plaintiff testified that she had experienced continued pain in her shoulder and neck, for which she takes pain medication. She stated that she experienced numbness in her neck radiating down her arm. However, her deposition testimony also indicated that she was able to go back to work the day after her accident and that she was not prevented from performing “substantially all” of her daily activities. Plaintiff’s subjective complaints of pain are insufficient to raise an issue of fact for a jury. (*Gaddy v. Eycler*, 79 N.Y.2d 955, 591 N.E.2d 1176, 582 N.Y.S.2d 990 [1992]). Additionally, Plaintiff’s complaints of pain without sufficient medical proof cannot establish that she suffered a serious injury under any of the three theories alleged in her Complaint.

According to the January 28, 2008 report, Board Certified Physician Dr. Steve Sharon conducted and reviewed the MRI of Plaintiff's cervical spine on October 13, 2006. He found evidence of a straightening of the cervical curvature, mild disc bulging and minimal bony ridging, and no focal disc herniation. According to the report, the spinal cord appeared normal in caliber and signal intensity. In addition, Dr. Sharon reported that the MRI showed mild uncovertebral degenerative change in the cervical spine.

Dr. Sharon's report failed to establish a triable issue of fact. In his report, Dr. Sharon noted that the findings of disc bulging and bony ridging were mild. He also did not identify a disc herniation. Despite the findings of Dr. Sharon from the MRI, it has been established that disc bulging and even disc herniation do not provide sufficient evidence to establish that Plaintiff suffered a serious injury. (See, *Kearse v. New York City Tr. Auth.*, 16 A.D.3d 45; 789 N.Y.S.2d 281 [2d Dept., 2005]). There is nothing in the MRI report to indicate that Plaintiff suffered a serious injury.

According to the sworn medical reports of Dr. Gerber, at her visits with Dr. Gerber Plaintiff complained of pain in her shoulder and neck. Dr. Gerber reported certain objective tests performed on the Plaintiff including the Spurling, the Neer, and the Hawkins test, as well as a range of motion test. Upon completion of those tests, Dr. Gerber concluded that Plaintiff's symptoms were mostly mild. In his report, he recommended that Plaintiff seek physical therapy and occasionally take anti-inflammatories if necessary. Dr. Gerber's reports did not establish a question of fact that Plaintiff had incurred either a significant or permanent consequential limitation of use of a body organ or member.

The report of Dr. Kozinn, similar to Dr. Gerber's findings, found that Plaintiff's limitation was minimal. He opined that there was no further need for rehabilitative treatment for her injuries. The reports of Dr. Kozinn and Dr. Gerber make it clear to this Court that there is no dispute that the injuries sustained by the Plaintiff do not surmount to a serious injury. Neither Dr. Kozinn's nor Dr. Gerber's medical conclusions substantiate the allegations that Plaintiff suffered a serious injury according to Insurance Law § 5102(d).

The Plaintiff did not offer evidence sufficient to support a finding of a serious injury as a result of the car accident, which gives rise to this lawsuit. Defendants' motion is granted and the complaint is dismissed.

The foregoing constitutes the Order of this Court.

Dated: June 24, 2008
Mineola, N.Y.

ENTERED
JUL 02 2008

NASSAU COUNTY
COUNTY CLERK'S OFFICE

J. S. C.
XXX

Karen V. Murphy