Palladino v Barnett

2008 NY Slip Op 32245(U)

June 19, 2008

Supreme Court, Nassau County

Docket Number: 6521-06/

Judge: F. Dana Winslow

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 7
NASSAU COUNTY

CHRISTOPHER E. PALLADINO,

Plaintiff,

-against-

KRISTEN M. BARNETT,

Defendant.

MOTION DATE: 4/30/08

MOTION SEQ. NO.: 001
INDEX NO.: 16521/06

The following papers read on this motion (numbered 1-3):

Notice of Motion..1
Affirmation in Opposition..2
Reply Affirmation...3

Defendant Kristen M. Barnett's motion for summary judgment pursuant to **CPLR §3212** is determined as follows.

Plaintiff Christopher E. Palladino, age 21, alleges that on March 28, 2006 at approximately 7:56 a.m., a motor vehicle operated by him came into contact with a vehicle owned and operated by defendant Kristen M. Barnett. The accident occurred on Rockaway Avenue at or near its intersection with 3rd Street, Garden City. Defendant now moves for an order dismissing plaintiff's complaint pursuant to **CPLR §3212**, on grounds that plaintiff failed to sustain a "serious injury" within the meaning of **Insurance Law §5102(d)**.

Insurance Law §5102(d) provides that a "serious injury means a personal injury which results in (1) death; (2) dismemberment; (3) significant disfigurement; (4) a fracture; (5) loss of a fetus; (6) permanent loss of use of a body organ, member, function

or system; (7) permanent consequential limitation of use of a body organ or member; (8) significant limitation of use of a body function or system; or (9) 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" (numbered by the Court). The Court's consideration in this action is confined to whether plaintiff's injuries constitute a permanent consequential limitation of use of a body organ or member (7) or significant limitation of use of a body function or system (8). The Court finds that plaintiff has demonstrated a *prima facie* failure to prove a medically determined injury which prevented plaintiff from performing all of the material acts constituting his usual and customary daily activities for ninety days of the first one hundred eighty days following the accident (9).

In support of her motion for summary judgment, defendant submits an affirmed report of examination of orthopedist Vartkes Khachadurian, MD, dated October 1, 2007, covering an examination of September 17, 2007, affirmed report of examination of neurologist Steven Ender, DO, dated September 10, 2007, covering an examination of that date and affirmed reports of radiologist Melissa Sapan Cohn, MD, dated November 6, 2007, covering reviews of MRIs of plaintiff's cervical and thoracic spines performed on June 7, 2006.

Dr. Khachadurian found that physical examination of the cervical spine revealed backward extension of 70 degrees (normal 70 degrees), right and left rotation of 45 degrees (normal 45 degrees) and right and left tilting of 30 degrees (normal 30 degrees). Dr. Khachadurian found no evidence of spasm or pain in the cervical spine and noted that plaintiff was able to flex forward to touch his chin to his chest. Dr. Khachadurian reported normal deep tendon reflexes at the elbows and wrists and a normal sensory examination and motor power of the upper extremities. Dr. Khachadurian noted that plaintiff had a

normal heel and toe gait and was able to stand on his toes and heels without difficulty. Dr. Khachadurian also reported that plaintiff had no complaints with respect to his lumbar region and lower extremities. Dr. Khachadurian diagnosed "cervical sprain and thoracic contusion with no clinical evidence of neuromotor deficits and no clinical evidence of herniated discs, radiculitis or radiculopathy. Resolved." Dr. Khachadurian concluded that plaintiff had "no evidence of ongoing orthopedic disability related to the accident of 3/28/06."

Dr. Ender provides range of motion testing of plaintiff's neck finding lateral rotation to the left and right to approximately 80 degrees (80 degrees normal) and full flexion/extension to 45 degrees (45 degrees normal). With respect to plaintiff's back, Dr. Ender found plaintiff could flex his lumbar spine to approximately 90 degrees (90 degrees normal) and that side bending and lateral rotation of the thoracic spine was full to approximately 30 degrees (30 degrees normal). Dr. Ender also reported strength of 5/5 throughout, symmetrical deep tendon reflexes of 2+, intact sensory examination, heel and toe walking without weakness and a negative straight leg raising test in the sitting position. Dr. Ender diagnosed, "resolved cervical and thoracolumbar strain." Dr. Ender concluded that plaintiff had a normal neurological examination and "can continue with his current activities of daily living and working as a teacher without restriction."

Dr. Cohn reviewed an MRI of plaintiff's cervical spine, performed on June 7, 2006, and stated that it revealed a "straightening of the normal cervical lordosis" and no evidence of disc herniation or disc bulge. In addition, Dr. Cohn reviewed the MRI of plaintiff's thoracic spine, performed on June 7, 2006, and stated that it revealed disc desiccation and disc bulging at T9-T10 and T11-T12. Dr. Cohn opined that the disc bulges were unrelated to trauma and concluded that plaintiff has "mild degenerative changes at T9-T10 and T11-T12" and "no evidence of disc herniation or acute trauma related injury."

Defendant also submits the deposition testimony of plaintiff conducted on June 28,

2007. Plaintiff testified that approximately two weeks following the accident, he went to Island South Rehabilitation, as recommended by his attorney, complaining of neck and mid back pain where he subsequently underwent a course of physical therapy. Plaintiff stated that he was sent for MRIs but was not referred to any other healthcare professional. Plaintiff testified that he had no current or future appointments with healthcare providers although he "is looking to go back" as his neck and back still always bother him. He testified that at the time of the accident he was on his college baseball team but that he had to "sit out" for two months after the accident. Defendant's counsel subsequently confronted plaintiff with evidence of baseball results which demonstrated that plaintiff pitched games on March 29, 2006 (one day following the accident), April 14, 2006, April 20, 2006 and April 29, 2006. Plaintiff responded that he was "battling pain" and that he "had a feeling" he had to pitch because he was on scholarship.

Plaintiff also testified at his deposition that the accident has affected certain of his activities such as working out and running, "normal activities like when I bend, to shower and put on clothes." Plaintiff stated that subsequent to the accident he has been a high school bowling coach, has taught math, science and physical education classes as a substitute and at the time of the deposition, was working at a summer camp as a 'specialist' helping children with adventure type activities.

The Court finds that the reports of defendant's examining physicians, are sufficiently detailed in the recitation of the various clinical tests performed and measurements taken during the examination, so as to satisfy the Court that an "objective basis" exists for their opinions. Accordingly, the Court finds that defendant has made a *prima facie* showing, that plaintiff Christopher E. Palladino did not sustain a serious injury within the meaning of **Insurance Law §5102(d)**. With that said, the burden shifts to plaintiff to come forward with some evidence of a "serious injury" sufficient to raise a triable issue of fact. **Gaddy v. Eyler**, 79 NY2d 955, 957.

Plaintiff submits an affirmed report of Nizarali Visram, MD, dated April 7, 2008, covering examinations conducted on April 11, 2006, May 8, 2006, June 5, 2006 and March

11, 2008. Plaintiff also submits separate affirmed reports of Dr. Visram, dated April 11, 2006, May 8, 2006, June 5, 2006 and October 17, 2006, covering these same examinations. In several of said reports, Dr. Visram sets forth the results of MRIs of the cervical and thoracic spines performed on June 7, 2006 which he states revealed disc bulges at C3/4, C5/6 and C6/7 and disc bulges at T9/10 and T11/12.

Upon initial examination on April 11, 2006, Dr. Visram reported cervical flexion of 42/60, extension of 36/50, right rotation of 65/80, left rotation of 60/80, using a hand held goniometer. Dr. Visram noted intact sensation, deep tendon reflexes of 2+ in the upper and lower extremities, normal motor strength except for the bilateral shoulder abductors, spasms of the bilateral mid trapezeii upon palpation of the cervical spine and spasms of the paravertebral muscles upon thoracic palpation. Dr. Visram provided an initial clinical impression of post-traumatic cervical spine and thoracic spine sprain/strain.

Dr. Visram's report of the May 8, 2006 examination sets forth essentially the same results and notes a slight improvement in cervical range of motion as follows: "flexion of 45/60, extension 40/50, right rotation 68/80, left rotation 65/80 via hand held goniometer." At the June 5, 2006 examination, Dr. Visram once again reported similar results and noted another slight improvement in cervical range of motion as follows: "flexion of 48/60, extension 42/50, right rotation 70/80, left rotation 68/80 via hand held goniometer." Dr. Visram opined that neurologically, plaintiff was intact and recommended plaintiff have a follow-up in four weeks.

The next appointment reported was on March 11, 2008. Dr. Visram stated that plaintiff had stopped physical therapy three and one half months prior to the March 11, 2008 examination as a result of the termination of no-fault coverage. (The Court notes, however, that plaintiff testified at his deposition that he stopped physical therapy in August of 2006.) Dr. Visram made the following cervical range of motion findings: flexion 56 degrees (normal 60 degrees), extension 48 degrees (normal 50 degrees), right lateral rotation 66 degrees (normal 80 degrees), left lateral rotation 65 degrees (normal 80 degrees), right lateral bending 40 degrees (normal 45 degrees) and left lateral bending 41

degrees (normal 45 degrees). Dr. Visram also reported the absence of tenderness over the cervicothoracic paravertebral muscle, no tenderness of the thoracic spine, motor strength of 5/5 throughout, intact sensory examination, and deep tendon reflexes of 2+.

In his April 7, 2008 report, Dr. Visram provided a final diagnosis of post traumatic cervical disc bulges at C3/4, C5/6 and C6/7, post traumatic thoracic disc bulges at T9/10 and T11/12 and post traumatic cervical and thoracic spine sprain and strain. Dr. Visram concluded that plaintiff's injuries to his cervical and thoracic spine were significant and that the "pathologies and nerve injuries did not preexist the accident." Dr. Visram asserts that plaintiff was "discontinued from supervised physical therapy as it was felt maximum benefit ha[d] been achieved from physical therapy." The Court notes that Dr. Visram's statement regarding plaintiff's termination of treatment is in contradiction to plaintiff's deposition testimony wherein plaintiff testified that he stopped physical therapy because his no-fault coverage was terminated.

Plaintiff also submits reports of John Himelfarb, MD, dated June 7, 2006, covering MRIs of plaintiff's cervical and thoracic spines. Plaintiff submits undated "MRI affirmations" attached to each report which fail to comply with **CPLR §2106.** The affirmations are not "subscribed and affirmed by [Dr. Visram] to be true under the penalties of perjury." **CPLR §2106**. *See* **Offman v. Singh**, 27 AD3d 284; **Magro v. He Yin Huang**, 8 AD3d 245; **Bourgeois v. North Shore University Hospital at Forest Hills**, 290 AD2d 525. The report of a physician which is not affirmed, or subscribed before a notary or other authorized official, is not competent evidence. **CPLR 2106; Grasso v. Angerami**, 79 NY2d 814; **Felix v. New York City Transit Authority**, 32 AD3d 527; **Brobeck v. Jolloh**, 32 AD3d 526; **Bravo v. Rehman**, 28 AD3d 694; **Grossman v. Wright**, 268 AD2d 79; **Young v. Ryan**, 265 AD2d 547. However, since defendant's physician, Dr. Cohn, covered a review of the MRIs in her reports, the MRIs can be considered by the Court. **Kearse v. New York City Transit Authority**, 16 AD3d 45; **Pech v. Yael Taxi Corp**, 303 AD2d 733; **Ayzen v. Melendez**, 299 AD2d 381; **Perry v. Pagano**, 267 AD2d 290. With respect to plaintiff's cervical spine, Dr. Himelfarb found "straightening of the curvature of

the cervical spine with loss of the normal lordosis" and "posterior disc bulges at the C3-4, C5-6 and C6-7 levels, which are each encroaching upon the ventral aspect of the thecal sac and lateral recesses bilaterally." With respect to the MRI of plaintiff's lumbar spine, Dr. Himelfarb found "posterior disc bulges at T9 10 and T11 12, which are each encroaching upon the ventral aspect of the thecal sac and lateral recesses bilaterally."

Plaintiff also submits his affidavit, sworn to on March 17, 2008. Plaintiff attests that as a result of the accident, he continues to experience pain in his neck and back. Plaintiff claims that he stopped physical therapy treatment because Dr. Visram told him that he had reached maximum improvement (which claim contradicts his deposition testimony) and discharged him with home exercises. Plaintiff claims that he continues to "have difficulty bending, lifting, twisting and performing [his] normal day-to-day activities, such as showering and dressing."

It is the determination of this Court that the "gap in treatment" is fatal to plaintiff's claim that the evidence submitted is sufficient to raise a triable issue as to whether or not plaintiff sustained a "serious injury" within the meaning of **Insurance Law §5102(d)**. There is a gap in treatment between the admissible documented end of plaintiff's medical treatment on June 5, 2006 and one documented visit to Dr. Visram on March 11, 2008. "While a cessation of treatment is not dispositive–the law surely does not require a record of needless treatment in order to survive summary judgment–a plaintiff who terminates therapeutic measures following the accident, while claiming "serious injury," must offer some reasonable explanation for having done so." **Pommells v. Perez**, 4 NY3d 566 at 574.

The Court finds that plaintiff's contradictory explanations do not constitute a reasonable explanation for his over one and one half year gap in treatment. Dr. Visram states in his affirmed report of April 7, 2008, that plaintiff's last documented visit until the most recent visit on March 11, 2008, occurred on June 5, 2006. At that visit, Dr. Visram states that plaintiff "was recommended to continue physical therapy 3x a week for the next 4 weeks" and that "follow up in 4 weeks was recommended." This statement contradicts Dr. Visram's assertion in the conclusion section of the same affirmation that plaintiff was

"discontinued from supervised physical therapy as it was felt maximum benefit has been achieved from physical therapy." Moreover, Dr. Visram's statement that plaintiff's last physical therapy occurred approximately three and one half months prior to his visit of March 11, 2008 because his insurance denied further treatment contradicts his own assertion that plaintiff's treatment ceased because plaintiff had reached maximum benefit.

In addition, plaintiff himself provides inconsistent statements as to why he stopped treatment. In his deposition, he testified that his treatment discontinued in August 2006 after no-fault cut off coverage while in his affidavit, plaintiff attests that he continued physical therapy for four months after the accident at which time Dr. Visram informed him that he had reached his maximum improvement. Although plaintiff testified in his deposition that he had private insurance through his parents' policy, he provides no explanation as to why he did not seek medical attention for his injuries once no-fault was terminated.

Dr. Visram does not address Dr. Cohn's findings that plaintiff's cervical spine exhibits no evidence of trauma related injury and that there is evidence of degeneration in plaintiff's thoracic MRI. Dr. Visram's explanation that the "the absence of prior trauma at these levels suggests that the disc pathologies and nerve injuries did not pre-exist the [accident] is conclusory and does not sufficiently refute Dr. Cohn's findings. This lack of evidence as to causation renders plaintiff's claim that his alleged injuries occurred as a result of the accident highly speculative. "Plaintiff had the burden to come forward with evidence addressing defendant's claimed lack of causation." **Pommells v. Perez**, *supra* at 580; *See* **Siegel v. Sumaliyev**, 46 AD3d 666; **Roman v. Fast Lane Car Service, Inc.**, 46 AD3d 535; **Abreu v. Bushwick Building Products & Supplies, LLC**, 43 AD3d 1091; **Young Soo Lee v. Troia**, 41 AD3d 469; **Gomez v. Epstein**, 29 AD3d 950; **Bycinthe v. Kombos**, 29 AD3d 845; **Kaplan v. Vanderhans**. 26 AD3d 468; **Giraldo v. Mandanici**, 24 AD3d 419; **Lorthe v. Adeyeye**, 306 AD2d 252.

Moreover, plaintiff's complaints of subjective pain do not by themselves satisfy the "serious injury" requirement of the no-fault law. **Scheer v. Koubek**, 70 NY2d 678; **Ranzie**

v. Abdul-Massih, 28 AD3d 447; **Picott v. Lewis**, 26 AD3d 319; **Nelson v. Amicizia**, 21 AD3d 1015; **Kivlan v. Acevedo**, 17 AD3d 321; **Rudas v. Petschauer**, 10 AD3d 357; **Barrett v. Howland**, 202 AD2d 383. In his affidavit, sworn to on March 17, 2008, plaintiff's claim that his injuries are permanent and that he has difficulty performing his normal day-to-day activities such as showering and dressing is belied by his deposition testimony of June 28, 2007. At the deposition, plaintiff testified that subsequent to the accident he pitched four college baseball games and has been employed as a high school bowling coach, has taught elementary, middle school and high school math, science and physical education classes as a substitute, and at the time of the deposition, was working at a summer camp as a 'specialist' helping children with adventure type activities.

In addition, although the report of plaintiff's radiologist covering a review of plaintiff's MRIs reveal disc bulges in the cervical and lumbar spines, the Court notes that the existence of a radiologically confirmed disc injury alone will not suffice to defeat summary judgment. *See* **Pommells v. Perez**, *supra* at 574; **Patterson v. NY Alarm Response Corp.**, 45 AD3d 656; **Bravo v. Rehman**, *supra*; **Howell Reupke**, 16 AD3d 377; **Kearse v. New York City Transit Authority**, *supra*. ;Plaintiff has also failed to submit competent medical evidence that the injuries that he sustained rendered him unable to perform all of his usual and customary daily activities for ninety days of the first one hundred eighty days following the accident.

The Court has examined the parties' remaining contentions and find them to be without merit.

On the basis of the foregoing, it is

ORDERED, defendant KRISTEN M. BARNETT's motion for summary judgment dismissing the complaint of plaintiff CHRISTOPHER E. PALLADINO, on the grounds that plaintiff failed to sustain a "serious injury" within the meaning of **Insurance Law §5102(d)** is **granted**.

Defendant shall serve plaintiff with a copy of this Order within 15 days after entry of this Order in the records of the Nassau County Clerk.

This constitutes the Order of the Court.

Dated: June 19, 2008 ENTER:

J.S.C.

ENTERED
JUN 27 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE