

Johnson v Celestin

2008 NY Slip Op 32396(U)

August 25, 2008

Supreme Court, Nassau County

Docket Number:

Judge: Anthony L. Parga

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK - NASSAU COUNTY

Present:

HON. ANTHONY L. PARGA

Justice

-----X PART 11
CATANYA JOHNSON,

INDEX NO. 511/05

Plaintiff,

-against-

MOTION DATE: ¹⁶6/18/08
SEQUENCE NO. 001, 002

ROLAND CELESTIN,

Defendant.

-----X

Notice of Motion, Affs. & Exs.....	<u>1</u>
Notice of Cross-Motion, Affs. & Exs.....	<u>2</u>
Affirmation In Opposition & Exs.....	<u>3</u>
Reply Affirmation & Exs.....	<u>4</u>
Defendant's Memorandum of Law.....	<u>5</u>

Upon the foregoing papers, it is ordered that the motion by defendant for an order pursuant to CPLR 3121 and Insurance Law §5102 granting summary judgment dismissing the Complaint on the ground that the plaintiff did not sustain serious injury is denied. The cross-motion by plaintiff for an order granting summary judgment on the issue of liability is granted without opposition.

This is an action to recover damages for the personal injuries sustained by the plaintiff as a result of a two-car accident which occurred at the intersection of Babylon Turnpike and Oak Street in Roosevelt, N.Y. on April 14, 2003.

The injuries as enumerated in the Bill of Particulars include: a series of cervical, thoracic and lumbar spine injections; bulging discs; spasms, radiculopathy,

subluxation; sprain and lordosis; arm and leg paresthesia and numbness. Plaintiff was confined to bed for 5 days and to home until August 8, 2003.

In support of this application defendant submits the sworn report of orthopedist, Dr. Wayne Kerness. He reviewed plaintiff's medical records and examined her on October 3, 2006 performing objective tests noting plaintiff's results against the normal range of results. Dr. Kerness concluded: "Catayan Johnson is not in need of any treatment from an Orthopedic perspective inclusive of physical therapy. This claimant has no disability. She is independent in all her activities of daily living. The claimant can function at full capacity. There are no permanent or residual injuries".

Defendant's neurologist, Warren Cohen, examined plaintiff on October 3, 2006 after reviewing her medical records and concluded: "Cervical sprain, resolved; Lumbar sprain, resolved; Neurologic exam reveals no neurologic deficit and there is no evidence of radiculopathy or traumatic neuropathy." Subsequently, Dr. Warren Cohen's sworn report indicates an examination of plaintiff on June 26, 2007 with objective standards, a review of medical records and concludes "Status-post lumbar sprain - resolved. Neurologic exam reveals no neurologic deficit and there is no evidence of radiculopathy or traumatic neuropathy. There is no indication of epidural steroid injections at this time..... There is no permanent or residual injury."

Defendant's radiologist Marc Brown's sworn report reviews a June 1, 2003 cervical and lumbosacral spine MIR's and concludes that: "It is my opinion within a reasonable degree of medical probability that the plaintiff Catanya Johnson has no structure abnormalities of the cervical spine or lumbar spine related to the accident dated 4/14/03".

In opposition, plaintiff submits the sworn affirmation of Dr. Juan Ledon, rehabilitative medicine treating physician who conducted range of motion testing on the spine on April 24, 2003 and treated her through August, 2003. He concluded: "she was discharged from any further medical treatment due to her poor response to the conservative physical therapy, acupuncture and chiropractic treatment she received and the fact that she reached maximum medical improvement". On January 21, 2008, an examination using objective tests again showed: "Significant restrictions and limitations she objectively demonstrates, as well as her current complaints and the objective medical finding I made concerning her condition, are and were caused by the injuries she sustained in the motor vehicle accident of April 14, 2003".

Plaintiff's primary care doctor, Dr. C. Nahas, treating her since the April 14, 2003 accident, submits a sworn narrative of the treatments, medications including 12 epidural steroid injections.

Dr. Aron Rovner, plaintiff's orthopedist's affirmation indicates examinations on March 29, 2006, October 18, 2006 and November 14, 2006 after three years of physical therapy and corticosteroid injections that did not relieve left leg numbness and parathesia. Dr. Rovner does not specifically describe the "objective testing performed by his office" but concludes that: "The results of the MRI films, her asymptomatic prior medical history for any of the similar complaints made post accident and the necessity for her subsequent surgical procedures; it is my professional opinion withion a reasonable degree of medical certainty that the significant restrictions and limitation Ms. Johnson objectively demonstrates, as well as her complaints and the objective medical finding I made concerning her condition,

are and were caused by the injuries she sustained in the motor vehicle accident of April 14, 2003"

Plaintiff's radiologists confirmed that there was no pre-existing degenerative disc disease. Radiologist, Dr. Linda Harkavy, examined the lumbar spine MRI dated January 12, 2006 and states in her affirmation that: "There is no evidence of any desiccation, osteophyte formation or degenerative disc disease." Radiologist Dr. David Payne affirms on examining the June 15, 2003 lumbar spine MRI that: ""There is no evidence of desiccation, osteophyte formation or degenerative disc disease."

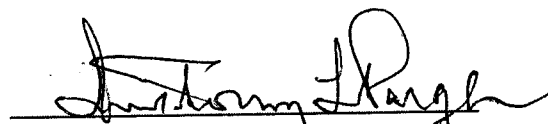
The proponent of a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact"(*Alvarez v. Prospect Hosp.*, 68 NY2d 320 (1986)). Once the movant has demonstrated a *prima facie* showing of entitlement to judgment, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v. City of New York*, 49 NY2d 557 (1980)).

It is the burden of the plaintiff to establish his or her serious physical injury by providing the Court with objective medical evidence, that there is a degree and extent of limitation of use and or function, which is permanent. An expert's designation of a numeric percentage of a plaintiff's loss of range of motion can be used to substantiate a claim of serious injury, provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system. *Toure v. Avis Rent A Car*, *supra*. It must be a medical opinion supported by objective tests, such as x-rays, MRIs, Laseque tests or other recognized tests with quantitative results. Such tests, to

be considered by the Court must be provided in admissible form (*Grasso v. Angerami*, 79 NY2d 813 (1991); *Friedman v. U-Haul Truck Rental*, 216 AD2d 266 (2nd Dept. 1995); *Pagano v. Kingsbury*, 182 AD2d 268 (2nd Dept. 1992)).

Plaintiff has met her burden in demonstrating explanations and questions of fact as to the gap in treatment, the non-existence of any degenerative or prior spinal injuries/conditions and continued alleged serious injury as a result of the April 14, 2003 accident with defendant.

Dated: August 25, 2008.



Anthony L. Parga, J. S.C.

ENTERED

AUG 27 2008

NASSAU COUNTY
COUNTY CLERK'S OFFICE