

Montes v Rodriguez

2008 NY Slip Op 33392(U)

December 9, 2008

Supreme Court, Nassau County

Docket Number: 15721/06

Judge: Roy S. Mahon

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON

Justice

AGUSTIN MONTES,

Plaintiff(s),

- against -

**PATRICIA RODRIGUEZ and CENTRO AMERICA
CORP. d/b/a CENTRO AMERICA TAXI CORP.,**

Defendant(s).

TRIAL/IAS PART 9

INDEX NO. 15721/06

**MOTION SEQUENCE
NO. 2**

**MOTION SUBMISSION
DATE: October 3, 2008**

The following papers read on this motion:

Notice of Motion	X
Affirmation in Opposition	X
Reply Affirmation	X
Memorandum of Law	X

Upon the foregoing papers, the motion by the defendants for an Order granting summary judgment to the defendant, is determined as hereinafter provided:

This personal injury action arises out of a two motor vehicle and a bicycle accident that occurred on April 30, 2006 at approximately 6:00 pm at the intersection of Prospect Avenue and Kinitel Street, New Cassel, NY. The plaintiff was riding the bicycle at the time of the incident in issue.

The plaintiff in the plaintiff's Verified Bill of Particulars, amongst other things, sets forth:

"11. The plaintiff, AGUSTIN MONTES, was caused to sustain the following injuries:

Right shoulder rotator cuff tear; right shoulder impingement; right shoulder derangement; right shoulder arthroscopy involving acromioplasty, release of the coracoacromial ligament, excision of bursa and debridement of rotator cuff tear; right acromioclavicular joint tenderness; right shoulder strain and sprain; right shoulder contusion; loss of range of motion, right shoulder; right shoulder supraspinatus and infraspinatur tendinosis; right trapezius muscle myofascial pain syndrome; right shouder scarring;

Left shoulder tendinosis; left shoulder strain and sprain; left shoulder contusion; left shoulder bone bruising; loss of range of motion, left shoulder; left shoulder pain and tenderness;

Focal central herniations at C5-6 and C6-7; posterior disc bulges at C3-C4 and C4-C5; radiculopathy at C5 and C6; straightening of the cervical lordosis; cervical strain and sprain; loss of range of motion, cervical spine; cervicobrachial syndrome; right hand numbness and weakness; neck pain radiating to right shoulder; cervical muscle spasm; right trapezius muscle pain;

Disc bulges at L4-L5 and L5-S1 with extension of disc into the neuroforamen bilaterally; lumbar spine; low back syndrome; low back pain; lumbar muscle spasm;

Post concussive headache syndrome; loss of consciousness; vertigo; abdominal contusion; abdominal pain; anterior chest contusion; substantial impairment of plaintiff's ability to engage in his normal daily activities;"

The defendants in support of the defendants' application submit the January 10, 2008 deposition transcript of the plaintiff; a letter report dated June 10, 2008 of Salvatore Corso, MD, an orthopedist of an orthopedic examination of the plaintiff conducted on that date; an affirmed letter report dated June 10, 2008 of Rehabilitation Services, PC by Edward M. Weiland, MD, a neurologist of a June 10, 2008 neurological examination of the plaintiff and three affirmed letter reports of Scott A. Springer, D.O., a radiologist, all dated September 8, 2007 of a review of a June 1, 2006 MRI of the plaintiff's cervical spine; a June 1, 2006 MRI of the plaintiff's lumbar spine and a June 22, 2006 MRI of the plaintiff's right shoulder; certain records dated June 12, 2006 of James M. Liguori, D.O., a treating physician of the plaintiff regarding a somatosensory evoked potential study of the plaintiff's lower extremities and certain radiological records of Nassau University Medical Center dated April 30, 2006; May 1, 2006 and May 2, 2006.

The rule in motions for summary judgment has been succinctly re-stated by the Appellate Division, Second Dept., in **Stewart Title Insurance Company, Inc. v. Equitable Land Services, Inc.**, 207 AD2d 880, 616 NYS2d 650, 651 (Second Dept., 1994):

"It is well established that a party moving for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642; *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (*State Bank of Albany v. McAuliffe*, 97 A.D.2d 607, 467 N.Y.S.2d 944), but once a prima facie showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572; *Zuckerman v. City of New York*, *supra*, 49 N.Y.2d at 562, 427 N.Y.S.2d 595, 404 N.E.2d 718)."

It is noted that the question of whether the plaintiff has made a prima facie showing of a serious injury should be decided by the Court in the first instance as a matter of law (see **Licaro v. Elliot**, 57 NY2d 230, 455 NYS2d 570, 441 NE2d 1088; **Palmer v. Amaker**, 141 AD2d 622, 529 NYS2d 536, Second Dept., 1988; **Tipping-Cestari v. Kilhenny**, 174 AD2d 663, 571 NS2d 525, Second Dept., 1991).

In making such a determination, summary judgment is an appropriate vehicle for determining whether a plaintiff can establish prima facie a serious injury within the meaning of Insurance Law Section 5102(d) (see, **Zoldas v. Louise Cab Corp.**, 108 AD2d 378, 381, 489 NYS2d 468, First Dept., 1985; **Wright v. Melendez**, 140 AD2d 337, 528 NYS2d 84, Second Dept., 1988).

Serious injury is defined, in Section 5102(d) of the Insurance Law, wherein it is stated as follows:

"(d) 'Serious injury' means 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 pertinent part, the report of Dr. Corso sets forth:

PHYSICAL EXAMINATION:

The claimant is a 27 year-old male who stands 6'0" tall and weighs 140 pounds. He has brown hair and brown eyes and walks with a normal gait without the use of an assistive device.

Cervical Spine:

Examination of the cervical spine reveals maintenance of the normal cervical lordosis. Range of motion reveals flexion to 50 degrees (50 normal), extension to 45 degrees (45 normal), right and left lateral bending to 45 degrees (45 normal) and right rotation to 80 degrees and left rotation to 80 degrees (80 normal). Compression and Spurling tests are negative. Adson test is negative.

Deep tendon reflexes are 2+ and equal in the upper extremities. Muscle strength is 5/5. There are not signs of upper extremity atrophy. Sensation is intact.

Right Shoulder:

Examination of the right shoulder reveals well-healed arthroscopic portals. Range of motion is forward elevation to 170 degrees (180 degrees normal), abduction to 160 degrees (170 degrees normal), external rotation to 80

degrees (80 degrees normal) and internal rotation to T11 (to T7 normal). There is no tenderness. There is a negative impingement sign. Hawkin's Speed's Sulcus, O'Brien's Yergason's and apprehension tests are negative. Upper extremity strength including the rotator cuff is 5/5. There is no significant atrophy. There is no soft tissue swelling or effusion.

Left Shoulder:

Examination of the left shoulder reveals range of motion of forward elevation to 170 degrees (180 degrees normal), abduction to 170 degrees (170 degrees normal), external rotation to 80 degrees (80 degrees normal) and internal rotation to T7 (to T7 normal). There is a negative impingement sign. Hawkin's Speck's, Sulcus, O'Brien's, Yergason's and apprehension tests are negative. Rotator cuff strength is 5/5. There is no atrophy noted. There is no palpable tenderness, effusion or deformity.

Thoracolumbar Spine:

Examination of the thoracolumbar spine reveals maintenance of the normal lumbar lordosis. Range of motion of flexion is to 90 degrees (90 degrees normal), extension to 30 degrees (30 degrees normal), right and left lateral bending to 30 degrees (30 degrees normal) and right and left rotation to 30 degrees (30 degrees normal). Straight leg raise testing is negative, performed to 90 degrees bilaterally in the sitting position. There is point tenderness in the right paralumbar region. There is no buttock or sciatic notch tenderness. There is no spasm. Fabere and Laseque tests are negative.

Deep tendon reflexes are 2+ and equal in the lower extremities. Muscle strength is 5/5 with no noted atrophy. Sensation is intact.

IMPRESSION

- Cervical sprain resolved.
- Status post right shoulder arthroscopic surgery.
- Left shoulder sprain resolved.
- Lumbar sprain resolved."

Dr. Weiland's report of neurological examination provides:

NEUROLOGICAL EXAMINATION:

The claimant was noted to get on and off the exam table without difficulty.

A detailed neurologic examination was performed. Cognitive functions were intact, without evidence of aphasia or apraxia. Fundoscopic examination failed to reveal any signs of raised intracranial pressure. The corneal reflex was intact. The extraocular movements were full, without evidence of nystagmus. The pupils were equal and briskly reactive to light and accommodation. Facial sensation and the muscles of facial expression were

normal. Air conduction was greater than bone conduction bilaterally. The Weber test was midline. The head-tilt maneuver failed to identify any evidence of nystagmus. The palate moved upward symmetrically and the tongue protruded midline, without fasciculation.

There was no scalp or sinus percussion tenderness. Examination of the cervical spine revealed flexion and extension is to 45 degrees (normal 45 degrees), right and left lateral rotation is to 80 degrees (normal 80 degrees), and right and left lateral flexion is to 45 degrees (normal 45 degrees). Examination of the lumbar spine revealed flexion is to 90 degrees (normal 90 degrees), extension is to 30 degrees (normal 30 degrees), and right and left lateral flexion is to 30 degrees (normal 30 degrees).

Examination of the shoulders reveals range of motion of forward elevation to 150 degrees (150 degrees normal), backward elevation to 40 degrees (40 degrees normal), abduction to 150 degrees (150 degrees normal), adduction to 30 degrees (30 degrees normal), external rotation to 90 degrees (90 degrees normal) and internal rotation to 40 degrees (40 degrees normal).

There was no evidence of calvarial swelling. No vertebral body percussion tenderness or paraspinal muscle spasm was noted. Straight Leg Raising was unlimited at 90 degrees. There was no sciatic notch tenderness. The Fabere-Patrick sign was negative. No focal atrophic changes or adventitious movements were identified.

There was subjective complaints of pain with light palpation over the base of the neck, right suprascapular region, as well as lower lumbar area. However, no sign of active tissue inflammation or soft tissue swelling was noted at these sites.

Well healed portal scars were seen in the region of the right shoulder, consistent with the previous arthroscopic procedure. No signs of active tissue inflammation or soft tissue swelling were noted in the region of the right shoulder. Adson's maneuver was negative on the right. There was no clinical evidence of scapular winging.

The segmental motor evaluation revealed 5/5 power resistance throughout. Sensation was intact to all primary and cortical modality testing. There was no reproducible dermatomal or peripheral nerve distribution sensory loss noted. Deep tendon reflexes were normoactive throughout, with plantar flexor responses bilaterally. There was no evidence of a foot drop or hip tilt.

IMPRESSION:

1. Normal neurologic examination."

The respective reports of Dr. Springer state:

"REVIEW OF DIAGNOSTIC TESTS AND/OR MEDICAL RECORDS

Study: RIGHT SHOULDER MRI
Date of Exam: 06/22/2006

Findings

The patient is skeletally immature. There is no fracture, dislocation, or AC joint separation. There are no degenerative changes. There is no joint effusion or significant soft tissue swelling. The rotator cuff and biceps tendon are intact. No other gross abnormality is noted.

Impression

Unremarkable MRI of the right shoulder."

...

"REVIEW OF DIAGNOSTIC TESTS AND/OR MEDICAL RECORDS

Study: LUMBAR SPINE MIR
Date of Exam: 06/01/2006

The lumbar vertebral bodies are normal in height and alignment. There are no significant degenerative changes. There is no vertebral compression fracture or spondylolisthesis. The signal from the bone marrow is normal. There is no focal lytic or sclerotic lesions identified. The cunus medullaris is in a normal position and has a normal appearance. The visualized prevertebral soft tissues and paravertebral muscles are unremarkable. There is no disc space narrowing. There is minimal disc bulge at L4-L5. There is a mild disc bulge at L5-S1. These are broad-based. There is no contact with the existing nerve roots. There is no mass effect on the anterior thecal sac. There is no herniation or extrusion.

Impression

Minimal disc bulge at L4-L5. Mild disc bulge L5-S1. There is no herniation or extrusion. The remaining disc spaces are unremarkable."

...

"REVIEW OF DIAGNOSTIC TESTS AND/OR MEDICAL RECORDS

Study: CERVICAL SPINE MRI
Date of Exam: 06/01/2006

Findings

The cervical spine vertebral bodies are normal in height and alignment. There are no significant degenerative changes. There is no vertebral

compression fracture or spondylolisthesis. The signal from the bone marrow is normal. There are no focal lytic or sclerotic lesions identified. The visualized prevertebral soft tissues and paravertebral muscles are unremarkable. There is early disc desiccation at C4-C5, C5-C6 and C6-C7. There is minimal bulging at C3-C4, C4-C5, C5-C6 and C6-C7. There is no disc herniation.

Impression

There is early disc desiccation at C4-C5, C5-C6, and C6-C7. There is minimal bulging at C3-C4 through C6-C7. There is no herniation."

The respective unsworn reports of the plaintiff's treating physician James M. Liguori, D.O and the plaintiff's treating hospital Nassau University Medical Center which all set forth normal findings are properly considered in support of the defendant's application (see, **Pagano v Kingsbury**, 182 AD2d 268, 587, NYS2d 692 (Second Dept., 1992).

The Court finds that based upon a review of the defendants' submission that the defendants have not addressed that branch of the plaintiff's Verified Bill of Particulars related to the plaintiff's claimed right shoulder rotator cuff tear and right shoulder arthroscopy involving acromioplasty to establish that the plaintiff did not suffer said injury and surgery as a result of the accident in issue which occurred on April 30, 2006. As such, the defendants have not set forth a prima facie case for the requested relief and the Court has not considered the plaintiff's application.

Based upon the foregoing, the defendants application for an Order granting summary judgment to the defendant, is **denied**.

SO ORDERED.

DATED: 12/9/2008

Reps. Station
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J.S.C.

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