

Colon v Bernardin Gutierr Bernabe
2008 NY Slip Op 33658(U)
October 27, 2008
Supreme Court, Bronx County
Docket Number: 7519/07
Judge: Howard H. Sherman
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NEW YORK SUPREME COURT - COUNTY OF BRONX
PART 4

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

-----X
MELANIE M. COLON

Plaintiff,

-against-

BERNARDIN GUTIERR BERNABE,
SALEM TRUCK LEASING INC., and
PIGTAINER, INC.,

Defendants
-----X

Case Disposed	X
Settle Order	
Schedule Appearance	

Index No. 7519/07

DECISION/ORDER

Present
Howard H. Sherman
Justice

The following papers numbered 1 to 3 read on this motion for summary judgment noticed on June 25, 2008 and duly submitted on the Motion Calendar of July 25, 2008

	<u>PAPERS NUMBERED</u>	
Notice of Motion-Exhibits [A-K] and Affirmation annexed	1	
Affirmation in Opposition and Exhibits [A-J] annexed	2	
Affirmation in Reply and Exhibits [A-C] annexed	3	

Upon the foregoing papers, the motion and cross-motion are decided in accordance with the annexed decision/order filed herewith.

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BRONX COUNTY CLERK'S OFFICE

OCT 30 2008

Dated : October 27, 2008

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J.S.C.

HOWARD H. SHERMAN

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

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MELANIE M. COLON

Plaintiff,

Index No. 7519/07

-against-

**BERNARDIN GUTIERREZ BERNABE,
SALEM TRUCK LEASING INC., and
PIGTAINER, INC.,**

Defendants

DECISION/ORDER

Howard H. Sherman
Justice

-----X
Defendants **BERNARDIN BERNABE** ("Bernabe"), **SALEM TRUCK LEASING, INC.**, ("Salem"), and **PIGTAINER INC.**, ("Pigtainer") move for an award of summary judgment, on the grounds that the plaintiff **MELANIE COLON** did not sustain a serious injury as defined by Insurance Law 5102(d). Defendant **Salem** also maintains that the complaint should be dismissed as against it pursuant to 49 U.S.C.S. § 30106, the "Graves Amendment." Plaintiff opposes the motion and argues that defendants fail to make a prima facie case that plaintiff did not sustain a serious injury as a result of the motor vehicle accident and that there is objective medical evidence that plaintiff sustained both a significant limitation of use of a body function or system and a permanent consequential limitation of use of a body organ or member. In addition, plaintiff contends that the branch of the motion seeking to dismiss pursuant to 49 U.S.C. § 30106 should be denied as unsupported by documentary evidence and without merit. Plaintiff cross-moves to amend the complaint to assert a negligent entrustment cause of action against Salem.

FACTS AND PROCEDURAL BACKGROUND

Plaintiff seeks recovery for injuries allegedly sustained in a motor vehicle accident that occurred on September 7, 2006 on the service road of the Cross Bronx Expressway at its intersection with Ellis Avenue, Bronx, New York.

This action was commenced in February 2008 with issue being joined the following month.

THRESHOLD MOTION

Plaintiff alleges that she sustained the following injuries *inter alia* as a result of the motor vehicle accident: circumferential herniated disc at C4-C5; central bulging disc at C5-C6; focal left herniated disc at L4-L5 and at L5-S1; bilateral C6 sprain/strain and lumbar

radiculopathy; cervical neuritis and loss of range of motion of the spinal area (Verified Bill of Particulars ¶ 2). It is alleged that these injuries are permanent (Id.) and that after the accident, plaintiff was confined to home for a period of four days and totally disabled from the time of the accident until September 11, 2007 (Id. ¶¶ 7, 6.). It is also alleged that the injuries constitute a permanent loss of use of a body organ, member, function or system; a permanent consequential limitation of a body organ or member; a significant limitation of use of a body function or system, and/or a medically determined injury or impairment of a non-permanent nature which prevented plaintiff from performing substantially all of the material acts which constitute plaintiff's usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment (Id. ¶3).

Defendants move for an award of summary judgment asserting that plaintiff has not sustained a serious injury. In support, defendants submit copies of the pleadings (Exhibits A,B); the verified Bill of Particulars (Exhibit C); the affirmed reports of the independent medical examiners(Exhibits H-K), and the transcript of plaintiff's 09/12/07 examination before trial testimony (Exhibit E).

Plaintiff testified that at the time of the accident she was 32 weeks pregnant [COLON EBT: 27] . After the collision, she waited for an hour until the ambulance arrived to take her to the hospital where she was admitted and kept overnight for observation with a fetal monitor [EBT: 58-59; 73-78; 118-121]. Plaintiff testified that she was experiencing sharp abdominal pain in the immediate aftermath of the accident and during her hospital admission [Id. 65-66; 120]. As instructed at discharge, plaintiff followed up with her ob/gyn a few days later. She was also seeking a "letter to return to work." [Id. 123-124].

At that point, the abdominal pain had subsided, but plaintiff testified that she was still "sore." [Id. 126-127]. Plaintiff's physician told her to rest to alleviate the abdominal pains, which were then described by plaintiff as "four or five" on a scale of ten, and provided her with a letter to return to work [Id. 126-128]. Plaintiff returned to her job as a pre-school teacher two or three days later [Id. 9; 130]. Within the first week of the accident, plaintiff began to experience back pain described as " a sharp pain in my back, in my upper and lower back and my neck also got stiff which is why I move from side to side." [Id. 136]. She consulted a chiropractor and after securing permission from her gynecologist, commenced a course of treatment with the chiropractor at Bay Plaza Medical [Id. 129; 145-150]. Treatment consisted of massage, application of hot compresses and stretching of muscles [Id. 150]. After her baby was born on October 26, 2006, the resumed twice-weekly¹ chiropractic treatment also incorporated spinal manipulation [Id. 152]. The treatments at Bay Plaza included sessions with physical and massage therapists [Id. 159]. Plaintiff testified that when she resumed treatment, she also consulted with a neurologist affiliated with Bay Plaza [Id. 158]. She visited that neurologist on two occasions in 2007 [Id. 154-155] . In addition, she visited another neurologist, Dr. Radna, for a second opinion [Id. 164]. Dr. Radna whom she consulted on two occasions, prescribed a back brace and medication, including a muscle relaxant and Motrin 800 Id. 164-173]. Plaintiff testified

¹ At the time of the deposition, the treatments continued on a weekly basis [EBT : 151]

* 4]

that she continues to wear the brace every night for two hours [Id. 170] and takes the medications, on a daily basis, including the motrin, which was prescribed p/r/n/,[Id. 171-173]. She testified that she continues to experience constant upper and lower back pain as well as a constant neck pain, which was scaled as a "six or seven." increasing to "eight or nine." [Id. 140-141; 175-176]. Plaintiff also testified that she "can't sit down for a long period" and can't lift things as she had before the accident [Id. 178]. When she returned to work after a sixteen week maternity leave, she "got an assistant " as she "couldn't deal with the kids anymore because my back would constantly hurt." [Id.] Finally, plaintiff testified that prior to September 7, 2006 , she had never injured her back nor been involved in an accident "or other serious event." [Id. 16].

On October 10, 2007 , plaintiff submitted to orthopedic evaluation by Dr. Wayne Kerness (Exhibit H). She presented with complaints of pain in her neck, mid and lower back with tingling and numbness radiating to both upper extremities. For purposes of the evaluation, Dr. Kerness reviewed the diagnostic studies and medical reports associated with plaintiff's treatment , as well as the hospital records. Upon examination of the cervical spine, Dr. Kerness observed neither tenderness nor spasm. There was full range of motion of the cervical and the lumbar spine in all planes, as quantified and compared to normal readings. There was no tenderness nor spam observed upon examination of the thoracic spine and "full right and left back rotation." The Laseque , the supine straight leg raise, and the reverse seated straight leg raise tests were all negative and no spasm or tenderness of the lumbar spine noted. Muscle strength was 5/5 in all areas , bilaterally. Dr. Kerness concluded that plaintiff suffered from no disability or work restriction and diagnosed "status post cervical, thoracic and lumbar sprain/strain, resolved."

On November 29, 2007, plaintiff underwent neurological evaluation by Michael J. Carciente, M.D. (Exhibit I). She presented to the examination with complaints of worsened pain in the neck, the upper and lower back with numbness . Dr. Carciente reviewed the hospital records and the diagnostic studies and medical reports associated with plaintiff's treatment as well as Dr. Kerness's report. Upon motor examination, Dr. Carciente found neither atrophy nor fasciculations throughout the upper and lower extremities . The cervical spine examination revealed no evidence of paraspinal spasm² or scapular winging. The thoracic/lumbosacral spine examination revealed no evidence of paraspinal spasm and the straight leg maneuver was negative to about 90 degrees in the sitting position bilaterally. The concluding diagnosis was of a normal neurological examination with no findings "such as myotomal weakness, dermatomal sensory deficits, asymmetric reflexes, or atrophy supporting the presence of either a cervical or lumbosacral radiculopathy, and ..no correlation between the findings allegedly found in the spine MRI reports³ and today's exam."

² Dr. Carciente noted that upon spinal examination "[b]arely touching the back of the neck [the mid and the lower back] is said to produce tenderness."

³ There is no showing that Dr. Carciente reviewed the MRI films themselves, as the inventory of the twenty-three medical reports reviewed only refers to the 01/11/07 report of the studies.

[*5]
Dr. Jonathan Lerner (Exhibits J,K) reviewed lumbar and cervical spine MRI studies conducted on January 9, 2007 and a CT scan of the lumbar spine performed on November 19, 2007.

Dr. Lerner found that the **cervical** MRI revealed small central disc osteophyte complexes at C4-C5 and C5-C6 with effacement of the ventral subarachnoid space with no evidence of central canal spinal stenosis or neural foraminal narrowing. There was desiccation of the C4-C5 and C5-C6 intervertebral disc space signal consistent with degenerative disc disease and "suggestive of a chronic degenerative process as opposed to an acute trauma." In addition, Dr. Lerner noted that cervical disc bulges "will be seen in up to 57% of asymptomatic individuals." The report concludes "[e]valuation of this MRI examination reveals no causal relationship between the claimant's alleged accident and the findings of this MRI examination." The assessment of the **lumbar MRI** found mild diffuse disc bulges at L4-L5 and L5-S1 with mild effacement of the thecal sac. This finding was "seen in the setting of desiccation of the L4-L5 and L5-S1 intervertebral disc space signal which is consistent with degenerative disc disease and suggestive of a chronic degenerative process as opposed to an acute traumatic event." In addition, Dr. Lerner noted that lumbar disc bulges "will be seen in up to 63% of asymptomatic individuals." The report concludes "[e]valuation of this MRI examination reveals no causal relationship between the claimant's alleged accident and the findings of this MRI examination."

The evaluation of the **CT scan** of the lumbar spine revealed a broad based disc protrusion at L5-S1 with mild effacement of the thecal sac and mild bilateral neural foraminal narrowing. This finding was "seen in the setting of loss of intervertebral disc space height at the L5-S1 level as well as multilevel degenerative spondylotic changes "suggestive of a chronic degenerative process as opposed to an acute traumatic event." In addition, there was "a significant dextro-lumar scoliosis which may also have contributed to the degenerative disc disease at the L5-S1 level. Dr. Lerner concluded "no causal relationship between the claimant's alleged accident and the findings on this CT examination."

Upon review of the above, including findings of no disability upon recent examination as well as plaintiff's own testimony of resumption of her regular work schedule within days of the accident, it is submitted that defendants have made their prima facie showing that plaintiff did not sustain a serious injury as a result of the motor vehicle accident of September 7, 2006. Upon this showing, it is incumbent upon the plaintiff to come forward with proof in admissible form, of the existence of triable issues of fact that she sustained a serious injury (see, Franchini v. Palmieri, 1 NY3d 536 [2003]; Gaddy v. Eyler, 79 NY2d 955 [1992]). Plaintiff has failed to do so.

In opposition, plaintiff submits her affidavit (Exhibit E), the affirmations of three physicians (Exhibits A,C,D) and the affidavit of the treating chiropractor (Exhibit B) as well as the treatment records and diagnostic studies (Exhibit F).

Dr. Richard Radna affirms (Exhibit A) that plaintiff consulted him initially for purposes of neurological evaluation on June 26, 2007 .⁴ Upon this examination, Dr. Radna noted moderate bilateral paravertebral spasm in the cervical and lumbosacral regions with "moderately diminished range of motion." ⁵The Patrick's and straight leg raising tests were "moderately restricted bilaterally." The impression stated is "that of a causally-related cervical and lumbo-sacral, musculo-skeletal and radicular pain syndrome." The level of disability was assessed as "partial." Dr. Radna recommended physical therapy, and the use of a cervical collar and TLSO braces and prescribed motrin, skelaxin and elavil. Dr. Radna conducted a follow-up examination on November 27th and the results of that evaluation are nearly identical to those of the initial examination, i.e., bilateral paravertebral spasm with "diminished range of motion" and bilateral restrictive findings upon Patrick's and straight leg raising tests. Dr. Radna affirms that plaintiff "was suffering from causally-related cervical and lumbo-sacral, musculo-skeletal and radicular pain syndromes " and a "permanent partial disability ." [Affirmation of Richard Radna, M.D. ¶¶ 23-24]. Dr. Radna also affirms that he recommended the following surgical procedures for plaintiff's injuries: lumbar laminectomy, facetomy, primary or staged discectomy and posterior lumbar inter-body stabilization ." [Id. ¶26].

Dr. Lucas Bottcher attests(Exhibit B) that plaintiff initially presented to Bay Plaza Chiropractic on September 13, 2006 for examination and for evaluation of injuries sustained in the motor vehicle accident of the previous week [Affidavit of Lucas Bottcher, D.C. ¶ 2].⁶ Plaintiff presented with complaints of neck pain and stiffness as well as upper, mid and lower back pain. Dr. Bottcher performed range of motion testing of the cervical and lumbar spine and found restrictions as quantified and compared to normal readings.⁷

⁴ Also tendered as annexed to the affirmation are copies of the initial report and an "addendum " with respect to the 11/27/07 examination.

⁵Dr. Radna's report incorporates no specific quantitative findings, but includes a table assigning numeric percentages to gradations of "mild", "moderate", and "severe" restrictions of cervical and lumbo-sacral flexion and extension based upon "Determinations Made Via Visual Observation."

⁶ Also tendered as annexed is a copy of a report dated 07/07/08.

<u>⁷Cervical ROM</u>		<u>Lumbar ROM</u>	
Flexion	30/60	Flexion	30/90
Extension	30/50	Extension	10/30
Left Rotation	45/80	Left Rotation	15/30
Right Rotation	40/80	Right Rotation	10/30
Left Lateral Flexion	20/40	Left Lateral Flexion	10/20
Right Lateral Flexion	10/40	Right Lateral Flexion	10/20

There was muscle spasm upon digital palpation of the neck, and the mid, upper and lower back and positive findings upon Kemp's, Soto Hall, Braggard's and Foraminal Compression testing. He recommended a program of intermittent traction and chiropractic manipulation, ultrasound and electric stimulation with massage [Id. ¶ 7] and referred plaintiff for treatment by Drs. Ginsberg, Nir, and Radna. Upon re-examination on May 10, 2008, Dr. Bottcher attests that there were positive findings upon Kemp's, Braggard's, Soto Hall and foraminal testing and limitations of the range of motion of the cervical and lumbar spine as quantified and compared to normal readings." ⁸

Dr. Robert Marini, a Board Certified Pain Management and Rehabilitation specialist attests (Exhibit C) that he initially evaluated plaintiff on May 30, 2008 ⁹, with plaintiff presenting with complaints of pain and diminished range of motion in the cervical and lumbar spine. Upon examination of the cervical spine, Dr. Marini found active trigger points along the posterior trapezius muscle and "**diminished range of motion**" in three planes with the readings quantified, but not compared to normal findings [Affirmation of Robert Marini, M.D. ¶ 4]. Likewise, the findings with respect to the "**diminished range of motion**" of the lumbar spine in three planes are quantified, but not compared to normal findings [Id. ¶ 5]. The examination of the lumbar spine also revealed spasm along the paraspinal muscles on the right, tenderness along the SI joint and positive findings at 45 degrees upon straight leg raising in the supine position. Dr. Marini's diagnosis was of cervical and lumbosacral radiculopathy and he recommended a course of physical therapy for myofascial pain, trigger point massage and range of motion and referred plaintiff for further diagnostic testing to assess nerve root dysfunction at the lumbar level. Dr. Marini also prescribed Ultracet and Amrix. He affirms that plaintiff's injuries will "continue to require treatment and therapy" and that the motor vehicle accident "was the competent producing cause of her injuries."

Dr. Ellen Ginsberg, a Board Certified Anesthesiologist and Pain Management specialist affirms (Exhibit D) that plaintiff initially presented to her office on January 4, 2007 with complaints of pain and diminished range of motion of the cervical and lumbar spine with radiating pain and numbness of her hands and feet [Affirmation of Ellen Ginsberg,

⁸Cervical ROM

Flexion	35/60
Extension	35/50
Left Rotation	45/80
Right Rotation	45/80
Left Lateral Flexion	20/40
Right Lateral Flexion	20/40

Lumbar ROM

Flexion	45/90
Extension	15/30
Left Rotation	15/30
Right Rotation	10/30
Left Lateral Flexion	15/20
Right Lateral Flexion	10/20

⁹ Also tendered as annexed is the report of the 5/30/08 examination.

M.D. ¶ 2]. ¹⁰ The findings upon this initial exam, as designated in the pre-printed form , include decreased ranges of motion of the cervical and lumbar spine, findings of spasm upon palpation of the cervical , thoracic and lumbar spine and positive findings bilaterally upon Laseque and straight leg raise test with negative findings upon Patrick's, Febere, cervical foraminal compression, as well as heel and toe walking tests. Dr. Ginsberg referred plaintiff for MRI studies and designated a diagnosis of cervicalgia, cervicocranial syndrome, lumbago and thoracic sprain/strain as well as decreased ranges of motion of the cervical and lumbar spine. The treatment plan Dr. Ginsberg recommended included a course of physical therapy, acupuncture treatments, massage therapy, chiropractic manipulation as well as electrical nerve block and paravertebral anesthetic injections for which latter services, Dr. Ginsberg provided letters of medical necessity.

Plaintiff submits copies of the report of the 01/09/07 MRI studies as well as the 01/05/07 EMG/NCV study ¹¹ and the 11/19/07 CT scan of the lumbar spine; Dr. Radna's reports of 06/26/07 and 11/27/07 and prescriptions of January 14, 2008; Dr. Bottcher's reports of 02/26/07 and 07/07/08 ; Bay Plaza Chiropractic Group billings for chiropractic treatments for the period 9/13/06 through 05/10/08 ; Dr. Marini's 05/30/08 report, Dr. Ginsberg's 01/04/07 report ; the report of 01/09/07 computerized tom studies¹²; the Montefiore Medical Center records and FDNY Pre-Hospital Care Report (Exhibit F).

Plaintiff also submits the 10/30/07 letter of plaintiff's employer advising that "[d]uring the latter part of her pregnancy following a car accident, she had access to additional assistance and support in carrying out her classroom duties, as needed." (Exhibit G).

DISCUSSION AND CONCLUSION

Upon consideration of the medical submissions tendered by plaintiff , it is to be noted at the outset that the probative value of the physicians' affirmations and the chiropractor's affidavit are severely diminished by each doctor's use of conclusory assertions clearly tailored to meet statutory and decisional criteria insufficient to rebut a prima facie showing (see, Shaw v. Looking Glass Assocs., LP , 8 AD3d 100, 103 [1st Dept 2004]). This pattern extends to the use of bold and underlining font for such words and phrases as : "permanent"; "causally related" and "direct result."

More crucially, plaintiff fails to come forward with any medical evidence "responsive to defendants' showing that the MRIs of plaintiff taken shortly after the accident revealed only . . . degenerative changes, not any sudden trauma that can be causally related to the

¹⁰ Also tendered is the report of the initial examination of 01/04/07.

¹¹ Dr. Nir's studies , referenced as having been reviewed by defendants' orthopedic and neurological experts, diagnosed "bilateral lumbar radiculopathy L5/S2 level" and "bilateral C6 Sprain/Strain."

¹² The studies found totals of 15% cervical spine impairment and 14 % lumbar spine impairment .

accident (see Pommells v. Perez, 4 NY3d 566, 579 [2005]; Ronda v. Friendly Baptist Church, 52 AD3d 440 [2008]; Becerril v. Sol Cab Corp., 50 AD3d 261 [2008].” Reyes v. Esquillin, 2008 NY Slip Op 7030; 2008 N.Y. App.Div. LEXIS 6873 [1st Dept. 9/23/08]. This failure renders “speculative” the findings of causation made by the plaintiff’s experts (see, Cardillo v. Xenakis, 31 AD3d 636 [1st Dept 2006]).

In addition, plaintiff’s medical submissions suffer from other deficiencies including the failure of Dr. Ginsberg to specify the objective nature of tests incorporated to make her assessment of “decreased” ranges of spinal motion (see, Milazzo v. Gesner, 33 AD3d 317 [1st Dept 2006]) and the failure of both Dr. Ginsberg and Dr. Radna to specifically quantify the restrictions found as compared to normal readings , with the latter physician’s use of an unexplained graph , insufficient for this purpose. Moreover, while Dr. Marini’s assessment of restrictions in certain planes of the lumbar and cervical spine, these findings, while quantified, are of little probative value as they are not compared to normal findings in these planes. It is to be noted as well that Dr. Marini’s conclusions of causality are made for the first time upon a lone examination conducted one year and nine months after the subject motor vehicle accident and as previously indicated without reference to the clinical findings of degenerative disc disease. Moreover, the findings of the initial evaluation by the treating chiropractor, while quantified and compared to normal readings, fail to assess what impact, if any , the advanced state of plaintiff’s pregnancy has upon the observations.

Accordingly, plaintiff’s medical submissions are insufficient to raise a triable issue of fact that plaintiff sustained a serious injury as a result of the September 7, 2006 motor vehicle accident.

Motion Pursuant to 49 U.S.C. § 30106[SAFETEA-LU]

Defendants also seek to dismiss as to defendant Salem pursuant to the authority of the so-called “Graves Amendment” that bars vicarious liability actions against professional lessors and renters of vehicles otherwise permissible pursuant to Vehicle and Traffic Law § 388 (see, Graham v. Dunkley, 50 AD3d 55 [2d Dept. 2008]). The motion is supported by the affidavits of Jared Steinberg, Vice President of Salem, and defendant driver, Bernabe (Exhibits F,G). Plaintiff opposes the motion contending first, that the motion is deficient as unsupported by the requisite evidence, i.e., the rental agreement and respective maintenance/service records and second, that the motion is premature as Salem has produced no witness for deposition. In addition, plaintiff seeks to amend the complaint to assert a cause of action for negligent entrustment alleging that Salem breached its duty to ensure that it was leasing the vehicle to a competent operator. In reply, Salem tenders Bernabe’s deposition , a copy of the rental agreement and copies of the maintenance record for the vehicle for the one year period prior to the accident and contends that the application to amend should be denied as improperly noticed, untimely, and without merit absent a showing that Salem was aware of Mr. Bernabe’s involvement in two prior motor vehicle accidents respectively ten and seven years before this one.

[* 10]
Defendants contend that evidence of the prior accidents "are inadmissible and irrelevant to the current accident."

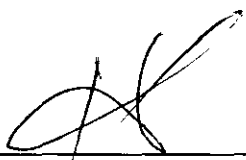
DISCUSSION AND CONCLUSIONS

In light of the court's determination on the threshold motion, the remainder of defendants' motion and plaintiff's cross-motion are both denied as academic.

Accordingly, it is ORDERED that defendant's motion be and hereby is granted and it is ORDERED that summary judgment be entered in favor of the moving defendants' dismissing the complaint on the grounds that plaintiff has not sustained a serious injury and it is further ORDERED that the remainder of the defendants' motion and plaintiff's cross-motion be and hereby are denied as academic.

This constitutes the decision and order of this court.

Dated: October 27, 2008



HOWARD H. SHERMAN