

McGaughey v McAvey

2009 NY Slip Op 30287(U)

January 29, 2009

Supreme Court, Nassau County

Docket Number: 6196-07

Judge: Anthony L. Parga

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK - NASSAU COUNTY

Present:

HON. ANTHONY L. PARGA

Justice

-----X PART 10

**JOAN McGAUGHEY, CHELSEA
McGAUGHEY and ROSA RIZZO,**

INDEX NO. 6196/07

Plaintiffs,

-against-

**MOTION DATE: 11/13/08
SEQUENCE NO. 001,002,003
004, 005, 006. 007**

**JOHN McAVEY, PETER VALENZE and
BRIAN OSHEA,**

Defendants.

-----X

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Upon the foregoing papers, it is ordered that the motion by plaintiff Joan McGaughey (Sequence #001) for an order granting summary judgment dismissing the counterclaim by defendant John McAvey on the issue of liability is denied.

The motion by defendant Peter Valenze for an order granting summary judgment pursuant to Insurance Law 5102(a) (Sequence #002) is withdrawn.

The cross-motion by defendant John McAvey for an order granting summary judgment pursuant to Insurance Law 5102 (Sequence #003) is denied.

The cross-motion by defendant O'Shea for an order granting summary judgment pursuant to Insurance Law 5102 (Sequence #004) is denied.

The motion by all plaintiffs for an order granting summary judgment on the issue of liability against all defendants (Sequence #005) is denied as untimely

The amended motion by defendant Peter Valenze for an order granting summary judgment dismissing claims of all plaintiffs and cross-claims against him) pursuant to Insurance Law 5102(a) (Sequence #006) is denied.

The amended cross-motion by defendant John McAvey for summary judgment pursuant to Insurance Law 5102(a) (Sequence #007) is denied.

In this action plaintiffs were involved in a four-car accident on Southern State Parkway on February 14, 2007. The plaintiffs Chelsea McGaughey and Rosa Rizzo were passengers in the first car operated by plaintiff Joan McGaughey; the second car was owned and operated by defendant John McAvey; the third vehicle was owned and operated by defendant Peter Valenze; and the fourth car was owned and operated by defendant Brian O'Shea.

The plaintiff's Bill of Particulars indicates that injuries for Rosa Rizzo include spinal disc herniations, left and right shoulder rotator cuff tear; right and left medial meniscal tears. The Bill of Particulars for Chelsea McGaughey include tendonopathy of left shoulder, spinal disc bulges and herniations, left shoulder rotator cuff tear and left shoulder derangement. The Bill of Particulars for Joan McGaughey includes injuries of spinal disc bulges and herniations and left arm carpal tunnel syndrome.

The motion by plaintiffs for an order granting summary judgment dismissing the Answers of all defendants with respect to liability is denied as untimely (*Brill v. City of New York*, 2 NY3d 648 (2004); *Andrea v. Arnone*, 5 NY3d 514 (2005)).

The certification order signed by all parties and this Court on June 23, 2008 expressly states that: "Motions for summary judgment must be filed (emphasis added) within (60) days of the filing of the Note of Issue " It is uncontested that

the Note of Issue was filed on July 23, 2008 and the plaintiffs' summary judgment motion filed on September 22, 2008 on the issue of liability beyond the sixty-day limit.

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)).

Plaintiff Joan McGaughey's motion is opposed by defendant John McAvey referring to his sworn testimony wherein he testified that his car's impact to plaintiff Joan McGaughey's car rear was caused by her suddenly jamming on her brakes and that two cars hit plaintiffs' car.

There are questions of fact with respect to the sequence of events in this four-car accident. Specifically, there is no dispute that plaintiff's car was hit twice, however, a question of fact remains as to the identity of the cars that hit plaintiffs' car and the injuries therefrom. Hence, plaintiff Joan McGaughey's motion to dismiss defendant McAvey's counterclaim on liability is denied.

Timely motion for summary judgment by defendant Valenze pursuant to Insurance Law 5102(a) was withdrawn due to a clerical error in lack of service of the motion on counsel for plaintiff on the counterclaim. An amended motion was served and filed untimely but will be considered in the court's discretion. Accordingly, the amended cross-motion by defendant Valenze will be considered.

In support of his motion for summary judgment defendant Valenze submits the sworn report of orthopedist J. Emmanuel after his examination and review of medical records of plaintiff Chelsea McGaughey. Dr. Emmanuel concluded that plaintiff Chelsea McGaughey's spinal sprains and left shoulder strains and sprains were resolved. Defendant Valenze also submits the sworn report of neurologist Andrie DeJesus who examined plaintiff Chelsea McGaughey on January 15, 2008 after reviewing medical records and concluded there is no neurological disability and the cervical and lumbar strain/sprain were exacerbated by a subsequent car accident in June 2007.

In opposition to the defendant Valenze's motion regarding her alleged injuries, plaintiff Chelsea McGaughey submits the sworn MRI reports of Dr. Richard Rizzuti and plaintiff also submits the sworn statement of Orthopedist Richard Parker based on objective tests after the September 18, 2008 examination concluded that: "... It is my orthopedic opinion that the aforementioned occurrence is the competent producing cause of the injury and disability sustained by this patient." "The subjective and objective findings were discussed with the patient in full. Due to the patient's pain in the neck, back and shoulder, the patient is prescribed Motrin (analgesic/anti-inflammatory) 600 mg, po Bid". Plaintiff Chelsea McGaughey, also in opposition, submits the sworn reports of her employer neurologist James Liguori, who distinguished the injuries of plaintiff's February 14, 2007 accident from those allegedly sustained as a result of the June 18, 2007 accident. Plaintiff Chelsea McGaughey has met her burden of demonstrating questions of fact with respect to her injuries.

In support of Valenze's motion as to plaintiff Rosa Rizzo, is the sworn report of orthopedist J. Emmanuel after his examination of plaintiff Rosa Rizzo on January

3, 2008. Dr. Emmanuel concluded after objective testing that "the cervical, thoracic, lumbar and bilateral shoulder strains and sprains" were resolved, notwithstanding "findings of slightly reduced ranges of motion....". Defendant's neurologist M. DeJesus examined plaintiff Rosa Rizzo on January 15, 2008 with objective tests and concluded that "cervical and lumbar strain/sprain, resolved".

In opposition, the sworn statement of Dr. Liguori is submitted. He examined plaintiff Rosa Rizzo again on January 30, 2008, February 27, 2008 and August 28, 2008. On August 28, 2008 Dr. Liguori, in a sworn statement, concluded that plaintiff, Rosa Rizzo, will be left with a "permanent partial disability".

Plaintiff Rosa Rizzo offers the sworn report of orthopedist, R. Parker, after a partial review of Rosa Rizzo's medical records and an examination on September 11, 2008, Dr. Parker concludes that the "left shoulder is still painful" and recommended continued physical therapy and analgesics. Dr. Parker also examined Rosa Rizzo after the accident on March 8, 2007 and concluded that: "This patient suffers from cervical sprain, radiculopathy, lumbar sprain, radiculopathy and HNP." Plaintiff Rosa Rizzo has met her burden of demonstrating questions of fact as to her injuries.

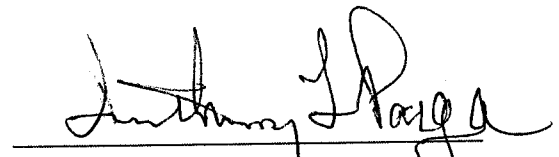
In support of Valenze's motion as to plaintiff Joan McGaughey, is the sworn report of neurologist, Dr. M. DeJesus who examined her on January 15, 2008 after reviewing her medical records. Dr. DeJesus concluded after objective testing that cervical and lumbar strain/sprain were "exacerbated by the motion vehicle accident in June 2007."

In opposition, plaintiff Joan McGaughey submits the sworn report of orthopedist Richard Parker after an examination on February 19, 2007; he concluded that there was disc herniation, strain of left shoulder, rotator cuff tear and impingement. Neurologist, James Liguori examined plaintiff Joan McGaughey and

concluded injuries of disc bulges, derangement and radiculopathy and "She will be left with a permanent partial disability. . . .The patient's lapse in treatment is due to her being followed on a prn basis as further treatment is of symptomatic nature only." Plaintiff Joan McGaughey's neurologist Timothy Mosomillo examined her on February 16, 2007 and concluded that she suffers from cervical and lumbar sprain/strain with shoulder derangement. Plaintiff Joan McGaughey has met her burden of demonstrating questions of fact as to her injuries.

The cross-motions by defendants McAvey and O'Shea for an order dismissing the Complaint and the cross-claims is supported by adopting the arguments set forth in the summary judgment motion by defendant Valenze. The motions by defendant McAvey and O'Shea are opposed by plaintiffs with the same proof to meet their burden as offered for the co-defendant Valenze's motion for summary judgment.

Dated: January 29, 2009.



Anthony L. Parga, J. S.C.

ENTERED

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