

Giron v Penaloza

2009 NY Slip Op 31259(U)

June 1, 2009

Supreme Court, Nassau County

Docket Number: 12099/07

Judge: Roy S. Mahon

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON
Justice

**BEVERLY GIRON, by her mother and natural
Guardian LOURDES GIRON, and LOURDES
GIRON, individually,**

Plaintiff(s),

- against -

MABEL PENALOZA,

Defendant(s).

TRIAL/IAS PART 8

INDEX NO. 12099/07

**MOTION SEQUENCE
NO. 1**

**MOTION SUBMISSION
DATE: March 25, 2009**

The following papers read on this motion:

Notice of Motion	XX
Affirmation in Opposition	XX
Reply Affirmation	X

Upon the foregoing papers, the motion by the defendant for an Order pursuant to CPLR 3212 and Article 51 of the Insurance Law of the State of New York granting summary judgment to defendant, Mabel Penaloza and dismissing the Complaint of plaintiffs, Beverly Giron by her mother and natural guardian, Lourdes Giron, and Lourdes Giron, individually, on the ground that the injuries claimed do not satisfy the "serious injury" threshold requirement of New York Insurance Law §5102(d) and thus, their claims for non-economic loss are barred by Section 5104(a) of the statute and the motion by plaintiff on the counterclaim, Lourdes Giron, for an Order granting the plaintiff on the counterclaim, Lourdes Giron, summary judgment pursuant to CPLR 3212 dismissing the complaint on the basis that the plaintiff, Beverly Giron did not sustain a "serious injury" under Section 5102(d) of the Insurance Law, are both determined as hereinafter provided:

This personal injury action arises out of a motor vehicle accident that occurred on June 17, 2006 at approximately 6:30 pm on East Meadow Avenue at or near its intersection with Maurice Avenue, Hempstead, New York.

The plaintiffs in the plaintiffs' Verified Bill of Particulars as to the plaintiff Beverly Giron set forth:

"5-5a. As a result of the occurrence, the Infant Plaintiff, BEVERLY GIRON, sustained the following personal injuries, all of which are alleged to be of a permanent nature:

L5-S1 central disc protrusion with mass effect on the anterior aspect of the

sac; L4-L5 disc bulge with effacement of the ventral sac; straightening of the lumbar lordosis; muscle spasm of the lumbar spine; lumbar disc displacement; acute sprain and strain of the lumbar spine; lower back pain radiating into the legs with numbness and tingling in both legs; lumbar subluxation complex with vertebral fixation; myalgia; hyperesthesia in left leg; loss of range of motion of the lumbar spine and limitation of motion with increased pain upon motion;

Straightening of cervical lordosis; cervico-brachial syndrome with muscle spasm; cervical disc displacement; cervicalgia; cervical subluxation complex with vertebral fixation, myalgia, acute sprain and strain of the cervical spine; neck pain radiating to both shoulders; loss of range of motion of the cervical spine and limitation of motion with increased pain upon motion;

Left knee pain; contusion of left lateral knee; left lateral rib pain; limitation of motion with increased pain upon motion; impairment of the plaintiff's ability to engage in her normal daily activities."

As to the plaintiff Lourdes Giron, the Verified Bill of Particulars provides:

"As a result of the occurrence, the Plaintiff, LOURDES GIRON, sustained the following personal injuries, all of which are alleged to be of a permanent nature:

C3-C4, C4-C5 and C5-C6 central disc bulges with mass effect on the ventral aspect of the sac; acute sprain and strain of the cervical spine; cervico-brachial syndrome; cervical subluxation complex with vertebral fixation, myalgia, neck pain radiating into both shoulders with numbness and tingling in the left hand; hypoesthesia at C6-T1 and in the left hand; loss of range of motion of the cervical spine and limitation of motion with increased pain upon motion;

L5-S1 central disc bulge with mass effect on the anterior aspect of the ventral sac; left L4 and L5 radiculopathy; acute sprain and strain of the lumbar spine; low back pain radiating into left lower extremity with numbness and tingling of left lower extremity; tenderness and contusion of left lower leg; hypoesthesia at L4-S1 and in the left leg; lumbar subluxation complex with vertebral fixation; myalgia, loss of range of motion of the lumbar spine and limitation of motion with increased pain upon motion;

Left elbow abrasion; left elbow pain; left arm pain and abrasion; left hip pain; left hip derangement and contusion; bilateral rib pain; chest pain; anterior chest and rib contusion; pain in thoracic spine; left shoulder pain; right shoulder pain; bilateral trapezius muscle pain with myofascial pain syndrome; Plaintiff received trigger point injection to left trapezius muscle; bilateral shoulder contusion and derangement; left abdomen pain; abdominal contusion; headaches, dizziness; nausea; post concussion syndrome; impairment of the plaintiff's ability to engage in her normal daily activities."

In support of the instant application, the defendant submits, amongst other things, a affirmed letter

report dated July 24, 2008 of Isaac Cohen, MD, an orthopedist of a July 24, 2008 orthopedic examination of the infant plaintiff Beverly Giron, and a July 24, 2008 affirmed letter report of Dr. Cohen of a July 23, 2008 orthopedic examination of the plaintiff Lourdes Giron.

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."

As to the plaintiff Beverly Giron, Dr. Cohen states:

"PHYSICAL EXAMINATION:

Claimant is an alert and cooperative, now 15-year old young lady, evaluated and interviewed in the presence of her mother, Ms. Lourdes Giron. Claimant stands about 5'3" tall, weighs 123 pounds, is right-hand dominant, and has black hair and brown eyes. Claimant moves and walks without evidence of difficulty; her gait is normal.

She is now a full time student in Nebraska, her place of residence for almost 2 years now. Claimant is bilingual.

Cervical Spine: On palpation of the cervical spine area, muscles are supple and non-tender with no muscle spasms or trigger point present. Range of motion is satisfactory normal in active fashion with flexion and extension of 45 degrees (normal up to 45 degrees), left and right lateral bending in the 45 degree range (normal up to 46 + 6.5), and rotation motion to the right and left in the 80 degree range (normal up to 78 + 15). Compression test and Spurling test are negative. Percussion test is negative.

Upper Extremities: Examination is satisfactory normal with present, equal and symmetrical reflexes in both biceps, triceps and brachioradialis. No sensorial deficit or motor weakness is present. Normal hand grip, pinch and grasp are present. Muscle power is 5/5 bilaterally on a clinical basis.

Lumbosacral Spine: In active fashion, flexion is to 90 degrees (normal up to 66 + 15), extension to 30 degrees (normal up to 33 + 5.5), and right and left lateral bending to 25 degrees (normal up to 29 + 6.6). Left and right rotational motion is possible to 30 degrees (normal up to 30). There is no tenderness, muscle spasms or trigger points noted on palpation of the lumbosacral spine area. There is maintenance of the normal lordotic curvature.

Lower Extremities: Straight leg raising is negative to 90 degrees in the sitting position. Reflexes are present, equal and symmetrical in both lower extremities, knee jerks and heel cords. Sensation is intact and motor strength is satisfactory at 5/5 on a clinical basis with no evidence of atrophy. She walks with a normal heel-toe gait and can stand on heels and toes without difficulty.

Left Knee: Examination reveals flexion from 1 to 150 degrees (up to 130 to 150 degrees normal). Extension is full. There is no instability noted. McCurray's test, Drawer sign, Apley's Compression test, Patella grind, and Spring test are negative. There is no tenderness in the medial or lateral joint line. There is no tenderness to palpation over the patella.

Ranges of motion were determined guided by the clinical measurements of joint motion issued by the American Academy of Orthopedic Surgeons, edited by Drs. Greene and Heckman. All measurements were taken with the goniometer.

DIAGNOSIS:

1. Status post motor vehicle accident
2. Cervical and lumbosacral strain, resolved
3. Left knee contusion, resolved

DISCUSSION:

At the time of this evaluation, the claimant has a completely normal functional capacity of the musculoskeletal system, and does not have any evidence of sequelae or permanency related to the accident of record. She has a completely normal functional capacity of the cervical and lumbosacral spine areas, with no evidence of muscle spasms, trigger points or neurological deficits. The left knee examination is completely normal also. She has not had the need for any active treatment since she moved to Nebraska almost 2 years ago, and none is indicated. She currently is participating in school activities according to the history obtained. The objective examination performed in my office today is completely unremarkable of her neck, back and left knee.

It is my opinion that this claimant underwent a satisfactory recovery of the soft tissue injuries sustained without any evidence of residual disability documented."

Dr. Cohen sets forth as to the plaintiff Lourdes Giron:

"PHYSICAL EXAMINATION:

Claimant is an alert and cooperative 38-year-old, Spanish-speaking right-handed dominant female who stands about 5'tall, weighs 158 pounds, and has black hair, brown eyes. Claimant moves and walks without evidence of difficulty, her gait is normal. She was interviewed in her native language by me with no communication problem.

Cervical Spine: On inspection, there is maintenance of the normal cervical curvature noted. Palpation of the paravertebral muscles is supple and non-tender. There is no evidence of muscle spasms or trigger points noted. Range of motion is satisfactory normal in active fashion with flexion and extension of 40 degrees (normal up to 45 degrees), left and right lateral bending in the 45-degree range (normal up to 46 + 6.5), and rotation motion to the right and left in the 80-degree range (normal up to 78 +15). Compression test, Percussion test are negative. Spurling test is negative to the right and left.

Upper Extremities: Reflexes are present, equal and symmetrical in both upper extremities, biceps, triceps and brachioradialis. No sensorial deficit or motor weakness is present. Normal hand grip, pinch and grasp are present. Range of motion of shoulders, elbows and wrists is also within normal range. Muscle strength, on a clinical basis is satisfactory at 5/5.

Left Elbow: There is no tenderness on palpation of th left elbow, and no evidence of scarring, swelling or erythema is documented. Range of motion of the elbow reveals flexion to 150 degrees (normal up to 150), pronation to 90 degrees (normal up to 90), and supination to 90 degrees (normal up to

90).

Lumbosacral Spine: On inspection of the lumbosacral spine area, maintenance of the normal lordotic curvature is noted. Range of motion in active fashion demonstrates flexion to 90 degrees (normal up to 66 + 15), extension to 30 degrees (normal up to 33 + 5.5), and right and left lateral bending to 25 degrees (normal up to 29 + 6.6). Left and right rotation motion is possible to 30 degrees (normal up to 30). Straight leg raising is negative to 90 degrees in the sitting position. There is no tenderness, muscle spasms or trigger points noted on palpation of the paravertebral muscles.

Lower Extremities: Examination of the lower extremities, particularly on the left, is satisfactory normal. Claimant walks with a normal heel/toe gait; she is able to stand on heels and toes without difficulty. Reflexes are present, equal and symmetrical in both knee jerks and heel cords. Muscle power in both lower extremities is 5/5 on a clinical basis. There is no evidence of muscle atrophy noted. Sensation is intact.

Left Knee: Examination reveals range of motion of flexion to 150 degrees (normal up to 130-150) with full extension. There is no medial or lateral instability noted, and no tenderness, erythema or swelling present. McMurray's and Drawer sign are negative. Lachman test and Spring test are negative.

Shoulders: Examination of the bilateral shoulders in active fashion reveals forward elevation to 165 degrees (up to 167 +/- 4.7 degrees normal), backward elevation to 60 degrees (up to 62 +/- 9.5 degrees normal), abduction to 185 degrees (up to 184 +/- 7 degrees normal), adduction to 30 degrees (up to 30 degrees normal), external rotation to 100 degrees (up to 104 +/- 8.5 degrees normal) and internal rotation to 70 degrees (up to 69 +/- 4.6 degrees normal). Supraspinatus press, Apprehension test and Yergason's test are negative. There is no tenderness or swelling. There are no abnormalities noted.

Ranges of motion were determined guided by the clinical measurements of joint motion issued by the American Academy of Orthopedic Surgeons, edited by Drs. Greene and Heckman. All measurements were taken with the goniometer.

DIAGNOSIS:

1. Status post motor vehicle accident
2. Multiple soft tissue contusions left elbow, shoulders, resolved
3. Cervical and lumbosacral strain, resolved

DISCUSSION:

At the time of this evaluation, the claimant has not been receiving any form of active treatment for an extensive period of time and none is indicated. She states she lives in Nebraska where she is no longer gainfully employed and is not receiving any active medical care of any nature. She does have gastritis which is unrelated to the accident of record for which she takes

medication.

Today's physical examination demonstrates a satisfactory normal functional capacity of the cervical and lumbosacral spine area, as well as the upper and lower extremities without any objective evidence of disability. The objective work up performed including MRI examination demonstrates some mild degenerative changes with no evidence of fracture or dislocation. MRI of the cervical spine area demonstrated some disc bulges of no clinical significance. MRI of the lumbosacral spine area demonstrates central L5-S1 bulging disc, also of no clinical significance.

In summary, it is my opinion that the claimant did sustain soft tissue injuries as a consequence of the accident of record for which she was aggressively and appropriately treated obtaining satisfactory resolution of the symptoms. At the time of this evaluation, there is no evidence of sequelae or permanency related to this accident and she is able to perform her normal activities in an unrestricted fashion with no evidence of functional limitation or any permanency documented.

On completion of this examination, the claimant offered no complaints as result of this examination and left the examination area stable and unchanged."

The Court finds that the defendants have submitted evidence in admissible form to make a "prima facie showing of entitlement to judgment as a matter of law" (**Winegrad v. New York University Medical Center, 64 NY2d 851, 853; Pagano v. Kingsbury, supra at 694**) and is sufficient to establish that the plaintiff did not sustain a serious injury. Accordingly, the burden has shifted to the plaintiff to establish such an injury and a triable issue of fact (**see Gaddy v. Eyler, 79 NY2d 955, 582 NYS2d 990, 591 NE2d 1176; Jean-Meku v. Berbec, 215 AD2d 440, 626 NYS2d 274, Second Dept., 1995; Horan v. Mirando, 221 AD2d 506, 633 NYS2d 402, Second Dept., 1995**).

In opposition to the requested relief, the plaintiffs submit as to the plaintiff Beverly Giron a letter report dated June 19, 2006 of Mendoza Chiropractic Office PC that is not supported by an affidavit of the Chiropractor (**see Dumanis v Conzo, 265 AD2d 296, 696 NYS2d 201 (Second Dept., 1999)**); an unsworn X-Ray report signed by Dr. Wayne Wagner; an affirmed letter report dated June 23, 2006 of Hempstead Total Medical PC by David Khanan, MD, PHD relative to an initial undated physiatry evaluation; an affirmation of Alan Lubitz, MD, a radiologist attesting to said physician's reports of MRIs of the plaintiff Beverly Giron's Cervical and Lumbar spine performed by said physician on July 20, 2006; an affirmed letter report dated August 5, 2006 of Dr. Khanan as to an undated physiatry re-evaluation and an affidavit of Jerry Jirka a chiropractor in Columbus, Nebraska as to office report dated February 6, 2009 of Beverly Giron. As to the plaintiff Lourdes Giron, the plaintiff submit Dr. Lubitz's affirmation as to a July 20, 2006 MRI of Lourdes Giron's cervical and lumbar spine; the affidavit of Dr. Jirka as to a February 6, 2009 report of said chiropractor; an affirmed letter report dated June 19, 2006 of Dr. Khanan of an initial physiatry evaluation of Lourdes Giron; an affirmed report of Dr. Wagner that is undated of a June 19, 2006 examination and an affirmed letter report dated July 29, 2006 of Dr. Khanan.

The Court initially observes that as to the plaintiff Beverly Giron, there is no submission by way of affidavit from the chiropractor to support said submission and that while the chiropractor has affirmed the reports as to Lourdes Giron pursuant to CPLR §2106, a chiropractor is not authorized to so affirm (see

Doumanis v Conzo, supra).

The reports of the radiologist Dr. Lubitz do not causally relate the conditions found therein for the respective plaintiffs to the accident in issue (see **Ukonu v Velazquez**, 213 AD2d 628, 624 NYS2d 195 (Second Dept., 1995)).

As to the plaintiff Beverly Giron, Dr. Khanan sets forth that his evaluation and re-evaluation took place in June 2006 and on August 5, 2006 and then said plaintiff was then seen by Dr. Jurka between August 15, 2006 and November 27, 2006. Dr. Jirka's diagnosis states that Beverly Giron suffers from cervical pain and lumbar pain. Such subjective complaints of pain are insufficient to establish a serious injury pursuant to §5102 of the Insurance Law (see **Scheer v Koubek**, 70 NY2d 678, 518 NYS2d 788, 512 NE2d 309). The plaintiff Lourdes Giron was seen by Dr. Khanan in June and July 2006 and thereafter by Dr. Jurka for the same period of time as the plaintiff Beverly Giron. Dr. Jurka's report sets forth similar subjective complaints of pain. Dr. Lubitz's reports of the MRI of said plaintiff's cervical and lumbar spine MRIs do not relate said findings to the accident in issue.

Based upon all of the foregoing, the defendant's application for an Order pursuant to CPLR 3212 and Article 51 of the Insurance Law of the State of New York granting summary judgment to defendant, Mabel Penaloza and dismissing the Complaint of plaintiffs, Beverly Giron by her mother and natural guardian, Lourdes Giron, and Lourdes Giron, individually, on the ground that the injuries claimed do not satisfy the "serious injury" threshold requirement of New York Insurance Law §5102(d) and thus, their claims for non-economic loss are barred by Section 5104(a) of the statute and the plaintiff on the counterclaim's motion for an Order granting the plaintiff on the counterclaim, Lourdes Giron, summary judgment pursuant to CPLR 3212 dismissing the complaint on the basis that the plaintiff, Beverly Giron did not sustain a "serious injury" under Section 5102(d) of the Insurance Law, are both respectively granted.

SO ORDERED.

DATED: *6/1/2009*

Reys. Mackon

ENTERED J.S.C.
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JUN 05 2009
 NASSAU COUNTY
 COUNTY CLERK'S OFFICE