

Siguenza v Pertile

2010 NY Slip Op 30780(U)

April 6, 2010

Supreme Court, New York County

Docket Number: 107917/2007

Judge: George J. Silver

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

PRESENT: GEORGE J. SILVER
J.S.C.

PART 22

Index Number : 107917/2007

SIGUENZA, EVELYN

vs

PERTILE, ROY E.

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

FILED
PAPERS NUMBERED
2
APR 08 2010

NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

In this action to recover for personal injuries allegedly arising out of a motor vehicle accident, defendants Roy E. Pertile and Verizon New York, Inc. (hereinafter defendants) move pursuant to CPLR § 3212 for summary judgment dismissing plaintiff Evelyn Siguenza's (hereinafter plaintiff) complaint on the ground that plaintiff did not sustain a serious injury as defined by Insurance Law § 5102 [d]. In the alternative, defendants move to vacate plaintiff's note of issue and reopen discovery based upon newly discovered evidence.

Plaintiff's verified bill of particulars alleges that plaintiff sustained the following serious injuries as a result of a February 9, 2007 motor vehicle accident: (1) permanent loss of use of a body organ, member, function or system; (2) permanent consequential limitation of use of a body organ or member; (3) significant limitation of use of a body function or system; and (4) 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. The bill of particulars further alleges that she sustained a left shoulder tear which necessitated surgery, and posterior disc bulges at C5-6, L3-4, L4-5 and L5-S1 and that she was confined to her bed and her home for approximately seven days and intermittently thereafter and was incapacitated from employment for approximately five days.

On a motion for summary judgment, where the issue is whether the plaintiff has sustained a serious injury under the no-fault law, the defendant bears the initial burden of presenting competent evidence that there is no cause of action (*Wadford v. Gruz*, 2006 NY Slip Op 9381 [1st

Dated: _____

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dept]). “[A] defendant can establish that [a] plaintiff’s injuries are not serious within the meaning of Insurance Law § 5102 (d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff’s claim” (*Grossman v Wright*, 268 AD2d 79, 83-84 [1st Dept 2000]). If this initial burden is met, “the burden shifts to the plaintiff to come forward with evidence to overcome the defendant’s submissions by demonstrating a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law” (*id.* at 84). The plaintiff is required to present nonconclusory expert evidence sufficient to support a finding not only that the alleged injury is serious within the meaning of Insurance Law § 5102(d), but also that the injury was causally related to the accident (*Valentin v Pomilla*, 59 AD3d 184 [1st Dept 2009]). In order to establish prima facie entitlement to summary judgment under the 90/190 category of the statute, a defendant must provide medical evidence of the absence of injury precluding 90 days of normal activity during the first 180 days following the accident (*Elias v. Mahlah*, 2009 NY Slip Op 43 [1st Dept]). However, the First department has previously held that a defendant can establish prima facie entitlement to summary judgment on this category without medical evidence by citing other evidence, such as the plaintiff’s own deposition testimony or records demonstrating that he or she was not prevented from performing all of the substantial activities constituting customary daily activities for the prescribed period (*id.*).

In support of their motion, defendants submit the affirmation of Dr. Lieberman, an orthopedist who examined plaintiff on November 4, 2008. Dr. Lieberman measured plaintiff’s range of motion in her neck and found that plaintiff’s flexion was 50 degrees with 50 degrees being normal, her extension was 60 degrees with 60 degrees being normal, her left and right bending was 45 degrees with 45 degrees being normal, and her left and right rotation was 80 degrees with 80 degrees being normal. Dr. Lieberman also measured plaintiff’s range of motion of her lower back and determined that plaintiff’s flexion was 80 degrees with 80 to 90 degrees being normal, extension was 30 degrees with 30 degrees being normal, left and right bending was 45 degrees with 45 degrees being normal, and left and right rotation was 45 degrees with 45 degrees being normal. Dr. Lieberman diagnosed plaintiff as having a resolving cervical sprain, a resolved lumbar strain and a resolving sprain of the left shoulder superimposed upon impingement problem. Dr. Lieberman opined that the sprained left shoulder exacerbated the impingement but that the impingement was not secondary to the accident. With respect to plaintiff’s left shoulder, Dr. Lieberman noted the presence of three arthroscopy scars. He also noted that plaintiff did not want to abduct or flex but was able to abduct and flex to 69 degrees, the normal range of motion being 180 degrees. The affirmation further states that there was a negative impingement SLAP and subscapularis signs. Dr. Lieberman also submitted an addendum to his report, dated August 26, 2009, in which he stated that the limited range of motion of plaintiff’s left shoulder was an active measurement, that the impingement was preexisting and that surgery for the impingement was not necessary.

Defendants’ also submit the affirmed report of Dr. Feuer, a neurologist who examined plaintiff on October 27, 2009. Dr. Feuer also measured plaintiff’s range of motion of her cervical spine and found that plaintiff’s flexion was approximately 45 degrees with 45 degrees being normal, her extension was approximately 55 degrees with 55 degrees being normal, and her right and left rotation was 70 degrees with 70 degrees being normal. Dr. Feuer found that flexion of

plaintiff's lumbosacral spine was 90 degrees with 90 degrees being normal, her extension was approximately 25 degrees with 25 degrees being normal, and her right and left lateral flexion was approximately 30 degrees was approximately 30 degrees with 30 degrees being normal. Dr. Feuer concluded that plaintiff's neurological exam was within normal limits and opined that plaintiff did not demonstrate any objective neurological disability or permanency that was casually related to the accident.

The affirmations of Drs. Lieberman and Feuer lack any probative value on the question of whether plaintiff sustained a serious injury as defined by Insurance Law § 5102 [d]. The discrepancies in the experts' affirmation regarding plaintiff's ranges of motion and, more particularly, what constitute normal ranges of motion, create an issue of fact for a jury to resolve (*Auguste v PTM Management Corp.*, 22 Misc3d 1102[A] [Sup Ct, Kings County 2008]). Moreover, Drs. Lieberman and Feuer did not set forth what objective tests performed to arrive at their conclusion that plaintiff had normal range of motion (*see Lamb v Rajinder*, 51 AD3d 430 [1st Dept 2008]).

Defendants' also submit the affirmed report of Dr. Tantleff, the radiologist who reviewed the MRI of plaintiff's left shoulder. Dr. Tantleff's impression was that the MRI reveals an increased body habitus with regional fatty infiltration and thickening of the regional musculature which "in itself may be associated with pain/impingement-type symptoms and may be causative of impingement-like findings." Dr. Tantleff concluded that the MRI was otherwise "essentially normal and unremarkable" and revealed no evidence of acute or recent injury. Dr. Tantleff's statement that plaintiff's increased body habitus may be associated with and causative of impingement-type findings is too equivocal to satisfy defendants' prima facie burden to show that plaintiff's left shoulder injury was not caused by the subject accident (*Glynn v Hopkins*, 2008 NY Slip Op 8267 [1st Dept]).

Therefore, defendants' have failed to establish through the experts' affirmed reports that plaintiff did not suffer a serious injury as defined by Insurance Law § 5102 [d]. However, defendants also argue that plaintiff's claim must be dismissed because of a gap in plaintiff's treatment. At her October 3, 2008 deposition, plaintiff testified that the last time she saw anyone for treatment of the injuries she allegedly sustained in the February 9, 2007 accident was three months prior to her deposition when she claims she saw Dr. Avella. According to the affirmation of Dr. Simoncic, who performed surgery on plaintiff's left shoulder on August 3, 2007, submitted by plaintiff in opposition to the motion, he last saw plaintiff on September 20, 2007 when he found a slight decrease in range of motion and noted that the plaintiff was attending physical therapy three times a week. An affirmed follow-up evaluation report by Dr. Avella dated August 21, 2007, also part of plaintiff's opposition, indicates that plaintiff had been cleared by her orthopedist to re-start physical therapy and that she would "continue physical therapy for her neck, back, *right* shoulder and knee" [emphasis added]. The last entry in Dr. Avella's progress notes is dated September 25, 2007. Therefore, based upon plaintiff's own submission, it appears that plaintiff's treatment ceased in or about September 2007. Even if the court were to credit plaintiff's deposition testimony that she stopped receiving treatment for her injuries approximately one year later in or about July 2008, an unexplained cessation of treatment nevertheless exists. Dr. Simoncic's affirmation does not address this cessation, nor does Dr. Avella's. The only possible explanation for the cessation in treatment is found in plaintiff's

deposition testimony wherein she stated that she stopped physical therapy after she was told by Dr. Avella that she was going to have her condition for the rest of her life. Since it can be inferred from plaintiff's testimony that she was informed that continuation of her medical treatment would have only been palliative in nature, plaintiff has proffered an adequate explanation for the cessation of treatment (*see Pommels v Perez*, 4 NY3d 566, 830 NE2d 278, 797 NYS2d 380 [2005]).

Defendants are, however, entitled to summary judgment on plaintiff's claim under the 90/180 day category of Insurance Law § 5102 [d] based upon plaintiff's allegations in her bill of particulars that she was confined to her home and her bed for only seven days and was incapacitated from employment for approximately five days (*Hernandez v. Rodriguez*, 2009 NY Slip Op 4946 [1st Dept]). Moreover, Dr. Simoncic's claim that plaintiff's injuries prevented her from fully performing her usual and customary employment duties is too general to raise the inference that plaintiff was unable to perform her usual and customary activities during the statutorily required time period or that her confinement to bed and home was medically required (*Antonio v Gear Trans Corp.*, 2009 NY Slip Op 6379 [1st Dept]).

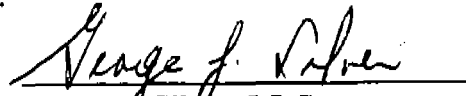
With respect to that branch of defendants' motion that seeks to vacate the note of issue and certificate of readiness, The Uniform Rules for the Trial Courts provide two distinct methods for obtaining disclosure after a note of issue is filed (*see* 22 NYCRR 202.21 [d], [e]; *Audiovox Corp. v Benyamini*, 265 AD2d 135, 139-140 [2d Dept 2000]). Under section 202.21 (e), a party may move to vacate a note of issue upon the ground that the case is not ready for trial, but it must do so "[w]ithin 20 days after service of a note of issue and certificate of readiness." Here, defendants' motion to vacate was brought 17 months after the note of issue was filed, and, therefore, was plainly untimely (*Audiovox Corp.* at 140). The other method of obtaining post-note of issue disclosure is found in 22 NYCRR 202.21 (d). This section permits the court to authorize additional discovery "[w]here unusual or unanticipated circumstances develop subsequent to the filing of a note of issue and certificate of readiness" that would otherwise cause "substantial prejudice." Because this section requires both unusual and unanticipated circumstances and substantial prejudice, it has been described as the "more stringent standard" (*Audiovox Corp.* at 140). Since there has been no showing as to when defendants were served with the note of issue and certificate of readiness, defendants must establish unusual or unanticipated circumstances warranting post note of issue discovery. Defendant met this burden by showing that plaintiff was hospitalized in January 2009 and that her medical records from that hospitalization may contain information relevant to plaintiff's future pain and suffering. Plaintiff does not oppose this branch of defendants' motion. Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment is granted only to the extent that plaintiff's claim under the 90/180 day category of Insurance Law § 5102 [d]; and it is further

ORDERED that the portion of defendants' motion seeking to strike plaintiff's note of issue and re-open discovery is granted to the extent that the parties are to appear for a discovery conference on May 21, 2010 at the courthouse located at 80 Centre Street, New York, New York 10013, Room 103 at 9:30 am; and it is further

ORDERED that defendants are to serve a copy of this order with notice of entry upon all parties within thirty days.

This constitutes the decision and order of the court.


George J. Silver, J.S.C.

Dated: April 6, 2010
New York County

GEORGE J. SILVER
J.S.C.

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