

**Flores v Fletcher**

2010 NY Slip Op 31035(U)

April 14, 2010

Supreme Court, New York County

Docket Number: 16467/07

Judge: Roy S. Mahon

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SCAW

**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

**Present:**

**HON. ROY S. MAHON**

**Justice**

**REINO FLORES,**

**Plaintiff(s),**

**- against -**

**JASON L. FLETCHER,**

**Defendant(s).**

**TRIAL/IAS PART 7**

**INDEX NO. 16467/07**

**MOTION SEQUENCE  
NO. 1**

**MOTION SUBMISSION  
DATE: February 3, 2010**

**The following papers read on this motion:**

**Notice of Motion**

**X**

**Affirmation in Opposition**

**X**

Upon the foregoing papers, the motion by defendant for an Order dismissing the complaint of plaintiff and granting summary judgment (CPLR 3212) to the defendant on the threshold issue, is determined as hereinafter provided:

This personal injury action arises out of a motor vehicle accident that occurred on June 22, 2007 at approximately 5:43 am on the exit ramp of the Northern State Parkway at or near its intersection with Broadway, Nassau County, New York.

The plaintiff in the plaintiff's Verified Bill of Particulars sets forth:

"5. Plaintiff sustained the following injuries:

- HERNIATED DISC IN THE CERVICAL SPINE WITH STENOSIS;
- MULTIPLE HERNIATED DISCS IN THE LOWER BACK;
- CERVICAL RADICULOPATHY;
- CERVICAL SPRAIN/STRAIN;
- LUMBOSACRAL RADICULOPATHY;
- LUMBAR SPRAIN/STRAIN;
- DEPRESSION;
- HEADACHES;
- ANXIETY;
- FEAR;

## EMOTIONAL UPSET AND SHOCK;

The above have resulted in pain, tenderness, weakness, discomfort, aching, restriction of motion, numbness, stiffness, atrophy, insomnia, deformity, the possible need for future surgery, spasm, stiffness, impairment of function, soft tissue injury, swelling partial and permanent loss of use of the neck and back areas, and, as a result, the entire body. The plaintiff also was and is required to take medication, with other side effects. In addition, this plaintiff was required to undergo painful and uncomfortable testing, and treatment and therapy, and has suffered curtailment of a great many activities. Upon information and belief, all of the above injuries and/or their residuals, except those of a superficial nature, are of a permanent nature.

Please take notice, that the extent defendants claim that any injuries sustained by the plaintiff were cause by the pre-existing conditions, the plaintiff alleges that any so claimed preexisting conditions were latent, inactive and dormant and were exacerbated and activated by the acts and omissions of the defendant giving rise to the accident and injuries as set forth herein."

The defendant in support of the defendant's application, amongst other things, submits an affirmed letter report dated July 7, 2009 of Joseph C. Elfenbein, MD, an orthopedist of a July 7, 2009 orthopedic examination of the plaintiff and a copy of the plaintiff's April 3, 2009 deposition transcript.

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. Elfenbein sets forth:

**"PHYSICAL EXAMINATION:**

Examination reveals a 30-year-old right-handed male who ambulates with a normal gait. He is 5 feet tall, weighs 130 pounds, and he has black hair and dark brown eyes. He is in no acute distress and is able to understand and cooperate during the examination.

**RANGE OF MOTION MEASUREMENTS:**

All ranges of motion are based on AMA guidelines. An objective device, a goniometer, was used to measure all ranges of motion.

**ORTHOPEDIC EXAMINATION:**

Cervical Spine: There is no muscle spasm noted at the paracervical muscles or at the trapezius bilaterally. There is no tenderness noted on palpation of the paracervical muscles bilaterally. Range of motion is noted to be in flexion at 60 degrees (45-60 degrees normal), extension at 60 degrees (45-60 degrees normal), right lateral flexion at 60 degrees (45-60 degrees normal) and left lateral flexion at 60 degrees (45-60 degrees normal) and left rotation at 90 degrees (70-90 degrees normal).

The following orthopedic tests are performed:

- Distraction - negative
- Soto Hall - negative

Neurological examination of the bilateral upper extremities shows as follows: There is no atrophy noted bilaterally. Muscle strength in each range is noted to be at 5/5 bilaterally. Deep tendon reflexes, biceps and triceps, are noted to be at 2+ bilaterally.

**Thoracic Spine:** There is no paraspinal spasm bilaterally. There is no tenderness noted on palpation bilaterally.

**Lumbar Spine:** There is no muscle spasm noted on palpation at the paralumbar muscles bilaterally. There is no tenderness noted on palpation bilaterally. Range of motion is noted to be in flexion at 90 degrees (75-90 degrees normal), extension at 30 degrees (20-30 degrees normal), right lateral bending at 45 degrees (30-45 degrees normal), and right rotation at 30 degrees (20-30 degrees normal) and left rotation at 30 degrees (20-30 degrees normal). Straight leg raise is negative bilaterally.

The following orthopedic test is performed:

- Fabere - negative

**Neurological examination of the bilateral lower extremities show as follows:** There is no atrophy noted in the muscles of the right and left thigh or right and left calf. Muscle strength in each range is noted to be at 5/5 bilaterally. Deep tendon reflexes are noted to be in the right knee at 2+. Sensation to light touch and pinprick is within normal limits bilaterally. Gait is normal. Heel-toe-walk is negative.

**Right Wrist/Hand:** There is no heat, swelling, effusion, erythema, or crepitus appreciated. Range of motion is noted to be in palmar flexion at 80 degrees (80-90 degrees normal), dorsiflexion at 70 degrees (70-85 degrees normal), pronation at 80 degrees (80-90 degrees normal) and supination at 80 degrees (80-90 degrees normal), radial-lateral motion at 15 degrees (15-20 degrees normal), and ulnar motion at 25 degrees (25-30 degrees normal). Range of motion of the digits of the hand is full. Grip strength is 5/5.

The following orthopedic tests are performed:

- Tinel's - negative
- Phalen's - negative

**Right Ankle/Foot:** There is no heat, swelling, effusion, erythema, crepitus, or atrophy appreciated. Range of motion is noted to be in dorsiflexion at 20 degrees (20 degrees normal), plantar flexion at 40 degrees (40 degrees normal) sub inversion at 30 degrees (30 degrees normal), and sub eversion at 20 degrees (20 degrees normal). There is no instability noted.

The following orthopedic test is performed:

- Drawer-s - negative

#### DIAGNOSES/IMPRESSION:

1. Cervical spine sprain/strain - resolved.
2. Thoracic spine sprain/strain - resolved.
3. Lumbar spine sprain/strain - resolved.

- 4. Right wrist/hand sprain/strain - resolved.
- 5. Right ankle/foot - resolved."

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 plaintiff submits, amongst other things, an affidavit of the plaintiff; an affidavit of Robert Diamond, MD, a radiologist as to an MRI of the plaintiff's cervical spine and an MRI of the plaintiff's lumbar spine; an affirmation of Kerin B. Hausknecht, MD a neurologist as to certain office records of said physician as to treatment rendered to the plaintiff on August 16, 2007; September 27, 2007 and October 18, 2007; an affirmed letter report dated November 11, 2009 of Paul Lerner, MD, a neurologist of a neurological examination of the plaintiff conducted on November 11, 2009 and a sworn letter report dated June 22, 2007 of Peter M. Swerz, a chiropractor, together with certain office records.

A review of the plaintiff's submission and in particular the affirmation of Dr. Diamond which establishes disc herniation together with the affidavit of Dr. Swerz which sets forth limitations upon the plaintiff's range of motion as measured therein both contemporaneous with the accident in issue create an issue of fact as to whether the plaintiff suffered a serious injury pursuant to §5102 of the Insurance law in the accident in issue. As such, the defendant's application for an Order dismissing the complaint of plaintiff and granting summary judgment (CPLR 3212) to the defendant on the threshold issue, is denied.

SO ORDERED.

DATED: *4/14/2010*

*Key S. Maloney*  
 ..... I.S.C.  
**ENTERED**  
 APR 19 2010  
**NASSAU COUNTY**  
**COUNTY CLERK'S OFFICE**