

**Gatewood v Sanchez-Fuentes**

2010 NY Slip Op 32699(U)

September 21, 2010

Supreme Court, Nassau County

Docket Number: 5551/09

Judge: Roy S. Mahon

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SCAN

**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

**Present:**

**HON. ROY S. MAHON**

**Justice**

**QUIANNA GATEWOOD,**

**TRIAL/IAS PART 7**

**Plaintiff(s),**

**INDEX NO. 5551/09**

**- against -**

**MOTION SEQUENCE  
NO. 1**

**TONI SANCHEZ-FUENTES and ESTRELLA BERRIOS,**

**MOTION SUBMISSION  
DATE: July 16, 2010**

**Defendant(s).**

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

<b>Notice of Motion</b>	<b>X</b>
<b>Affirmation in Opposition</b>	<b>X</b>

Upon the foregoing papers, the motion by defendants for an Order pursuant to CPLR 3212 and Article 51 of the Insurance Law of the State of New York granting summary judgment to defendants, Toni Sanchez-Fuentes and Estrella Berrios and dismissing the Complaint of plaintiff, Quianna Gatewood for personal injuries allegedly sustained in a motor vehicle accident on October 6, 2008 on the ground that the injuries claimed do not satisfy the "serious injury" threshold requirement of New York for non-economic loss is dismissible as a matter of law, is determined as hereinafter provided:

This personal injury action arises of a motor vehicle accident that occurred on October 6, 2008 at approximately 5:00 pm on Uniondale Avenue at or near its intersection with George Avenue, Nassau County, New York.

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

"5. Plaintiff sustained the following injuries:

- HERNIATED DISC AT C2-C3;
- HERNIATED DISCS AT L3-L4, L4-L5, C4-C5 AND C5-C6;
- BULGING DISCS AT C3-C4, C4-C5 AND C5-C6;
- BULGING DISC AT L2-L3;
- CERVICAL RADICULOPATHY;
- LUMBOSACRAL RADICULOPATHY;
- CERVICAL SPRAIN/STRAIN;

LUMBAR SPRAIN/STRAIN;  
 DEPRESSION;  
 HEADACHES;  
 ANXIETY;  
 FEAR;  
 EMOTIONAL UPSET AND SHOCK;

Please take notice, that the extent defendants claim that any injuries sustained by the plaintiff were caused 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 defendants in support of the defendants' requested relief, amongst other things, submit the plaintiff's Emergency Department records for October 6, 2008; the unsworn upper and lower extremities elecurodiagnostic studies of the plaintiff by Zarina Mandelblat, MD; the affirmed letter report dated November 10, 2009 of Lee M. Kupersmith, MD an orthopedist of an orthopedic examination of the plaintiff conducted on November 10, 2009 and two affirmed letter reports both dated December 9, 2009 of Melissa Sapan Cohen, MD, a radiologist of a review of an MRI of the plaintiff's cervical spine performed on November 11, 2008 and an MRI of the plaintiff's lumbosacral spine performed on December 18, 2008.

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. Kupersmith provides:

**"PHYSICAL EXAMINATION:**

The claimant is a 27-year-old, right-hand female who presents in no acute distress. She stands approximately 5'7" tall and weighs 276 pounds. She has brown hair and brown eyes. My female assistant was present throughout the entire examination. The claimant was advised not to perform any activity or range of motion, which was painful or not allowed by her treating physician. The claimant walked into the room without evidence of an antalgic gait. She was able to stand on her toes and stand on her heels. She had no pain with squatting.

Examination of the cervical spine revealed minimal tenderness to palpation with no evidence of spasm. She was able to forward flex to 50 degrees (normal 50 degrees), extension of the neck to 60 degrees (normal 60 degrees), lateral rotation to the left and right to 80 degrees, (normal 80 degrees), and lateral flexion to the right and left to 45 degrees (normal 45 degrees).

Examination of the lumbar spine revealed minimal tenderness to palpation with no evidence of spasm. She was able to forward flex to 60 degrees (normal 60 degrees), extension of the spine to 25 degrees (normal 25 degrees), lateral rotation to the left and right to 30 degrees (normal 30 degrees), and lateral flexion to the right and left to 25 degrees (normal 25 degrees). She had 5/5 strength in bilateral upper and lower extremities with 2+ deep tendon reflexes throughout. She had negative straight leg raises on the right and left, both in the seated and supine positions. There were no sensory deficits in the upper or lower extremities.

All range of motion were done by the claimant actively. All ranges of motion were done visually as well as with the use of handheld goniometer and based upon the American Association's Guides to Evaluation of Permanent Impairment, Fourth Edition from 1993.

The claimant denied any new complaints upon completion of this examination and left the room independently and without difficulty.

**DIAGNOSIS**

Cervical sprain/strain resolved, cervical herniated nucleus pulposus as per report only, lumbosacral sprain/strain resolved and lumbosacral herniated nucleus pulposus as per report only.

**DISABILITY:**

The claimant exhibits no disability at this time.

**CAUSAL RELATIONSHIP:**

If the accident history given is accurate, then causal relationship exists to the accident of 10/6/08.

The claimant has no objective findings to correlate with her subjective complaints."

The respective reports of Dr. Sapon Cohn as to said physician's review of the MRIs of the plaintiff's cervical spine and lumbosacral spine provide:

"I have reviewed the cervical spine MRI on Quianna Gatewood. The examination consists of sagittal T1, T2 and gradient echo axial images. The examination was performed on 11/11/08 at Advanced Medical Diagnostic and is diagnostic.

There is straightening of the normal cervical lordosis.

The disc spaces are well maintained. There is no evidence of disc herniation or disc bulge. No central canal or neural foraminal compromise is identified.

The marrow signal is normal. No intrinsic spinal cord abnormality is identified.

**IMPRESSION:**

Straightening of the normal cervical lordosis. Otherwise, unremarkable cervical spine MRI

**DISCUSSION:**

There is straightening of the normal cervical lordosis. This may reflect muscular spasm. Alternatively, this may be the result of the positioning of the patient's neck within the cervical coil necessary to perform the examination.

The disc spaces are otherwise, normal. There is no evidence for disc herniation or disc bulge at any level.

In my opinion, this is essentially a normal cervical spine MRI. There is no evidence of disc pathology or acute trauma related injury on the submitted study."

"I have reviewed the lumbosacral spine MRI on Quianna Gatewood. The examination consists of sagittal T1, and sagittal and axial T2 weighted

images. The examination is of extremely poor quality with axial images only obtained through the L4-5 and L5-S1 levels which are of diagnostic quality. This study was performed on 12/18/08 at Advanced Medical Diagnostic.

The normal lumbar lordosis is maintained.

The L1-2 and L2-3 disc spaces are normal.

At the L3-4 level a central disc herniation mildly effaces the ventral aspect of the thecal sac. There is mild disc space narrowing.

At the L4-5 level, there is disc desiccation and circumferential disc bulging contributing to mild bilateral neural foraminal stenosis.

The L5-S1 disc space is within normal limits.

The marrow signal is normal. The conus is poorly identified.

#### **IMPRESSION:**

L3-4 central disc herniation effaces the ventral aspect of the thecal sac.

L4-5 disc bulge with mild bilateral neural foraminal stenosis.

#### **DISCUSSION:**

This is an extremely poor quality examination. The study is firstly limited by patient body habitus. Non-diagnostic axial images are obtained through the L1-2 and L2-3 levels.

At the L3-4 level, there is evidence of a small central disc herniation effacing the central aspect of the thecal sac. This is not associated with any underlying degenerative changes to exactly date the age of the disc herniation. This disc herniation is of indeterminate age based exclusively upon MRI criteria. There are no additional findings on the submitted study to indicate that the disc herniation is acute in nature.

At the L4-5 level there is disc desiccation and disc bulging. Disc desiccation indicates that the disc has dried up and lost its normal water content. This is the commencement of degenerative disc disease.

There is also circ based exclusively upon MRI criteria. There are no additional findings on the submitted study to indicate that the disc herniation is acute in nature.

At the L4-5 level there is disc desiccation and disc bulging. Disc bulging is unrelated to trauma. Disc bulging occurs at the outer fibers of the disc, also known as the annulus fibrosis loses its normal elasticity. This allows the central, more gelatinous portion of the disc to bulge circumferentially. This is within the spectrum of degenerative disc disease and is not related to trauma.

In my opinion, this patient does have a disc herniation at the L3-4 level. The disc herniation is of indeterminate age based exclusively upon MRI criteria but

is not associated with any definitive findings confirming that it is acute in nature. Mild degenerative changes are present at the L4-5 level which are unrelated to trauma."

The defendants do not set forth whether Dr. Mandelblat who conducted the electrodiagnostic studies of the plaintiff is a treating physician of the patient in which case the unsworn report would be considered (see, **Pagano v Kingsbury**, 182 AD2d 268, 587 NYS2d 692 (Second Dept., 1992) or a physician who conducted a medical examination for the defendants. In the absence of a submission as to Dr. Mandelblat's relation to the plaintiff and based upon the fact that the submission of Dr. Mandelblat is not in admissible form, said submission has not been considered herein.

The unsworn report of the x-rays of the plaintiff's lumbar spine performed on the day of the accident in issue at Mercy Medical Center are properly considered herein (see, **Pagano v Kingsbury**, supra). Said report provides:

"Radiographs of the lumbar spine CPT 72100

CLINICAL INFORMATION: Pain

TECHNIQUE: Frontal and lateral views of the lumbar spine and lateral coned-down view of the lumbosacral junction were obtained.

FINDINGS: No previous examinations are available for review.

Lumbar vertebral alignment is maintained. Lumbar vertebral body heights are preserved. Pedicles are intact. No fracture or destructive bone lesion is seen.

Lumbar intervertebral disc spaces appear intact. Disc heights are maintained. No significant productive changes are found.

The sacroiliac joints appear intact.

IMPRESSION: Unremarkable radiographs of the lumbar spine."

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 an affidavit of the plaintiff herself; an affirmation of Mark Shapiro, MD a radiologist of a review of the MRIs of the plaintiff's cervical and lumbar spines; an affirmed letter report dated June 30, 2010 of Paul Lerner, MD, of a medical examination fo the plaintiff conducted on June 30, 2010 and an affirmation of Svetlana Khandros, MD, a treating physician of the plaintiff.

The affirmation of Dr. Shapiro sets forth:

"2. On June 14, 2010, I conducted an independent review of Ms. Gatewood MRI films of her cervical and lumbar spines. I also reviewed Ms. Gatewood's medical records relating to the subject accident and the Independent Medical Examination reports of radiologists, Dr. Cohen, defendants' radiologists that states that Ms. Gatewood's injuries to her cervical and lumbar spines are due to degeneration.

3. I disagree with the findings of D. Cohn that the cervical and lumbar spines films show degeneration. In my opinion, to a reasonable degree of medical certainty, these films show, C2-3 disc bulge and C5-6 focal central herniation in the cervical spine and L3-4 and L4-5 central disc herniations creating stenosis in the lumbar spine that are causally related to subject accident of 10/6/08 with no signs of degeneration.

4. My opinion to a reasonable degree of medical certainty is based on my review of Ms. Gatewood's MRI films and reports, her 26 year old age at the time fo the accident, lack of any prior complaints of cervical and lumbar spines injuries prior to the subject accident and her acute onset of pain directly after the subject accident.

5. Moreover, my determination is also based on the fact that the films do not reflect the existence of osteophytes and spondylosis or other such conditions commonly reflecting long-standing degenerative disease."

Based upon said submission, there is 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 defendants' 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 defendants, Toni Sanchez-Fuentes and Estrella Berrios and dismissing the Complaint of plaintiff, Quianna Gatewood for personal injuries allegedly sustained in a motor vehicle accident on October 6, 2008 on the ground that the injuries claimed do not satisfy the "serious injury" threshold requirement of New York for non-economic loss is dismissible as a matter of law, is denied.

SO ORDERED.

DATED: 9/21/2010

.....  
*Roy S. Makon*.....  
J.S.C.

**ENTERED**

SEP 24 2010

NASSAU COUNTY  
COUNTY CLERK'S OFFICE