Putala v Gutierrez

2010 NY Slip Op 33080(U)

October 26, 2010

Supreme Court, Queens County

Docket Number: 19928/2008

Judge: Robert J. McDonald

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Short Form Order **b**

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - PART TT-34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T :

HON. ROBERT J. McDONALD,
Justice

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JOANNA PUTALA, Plaintiff, - against - FERNANDO GUTIERREZ and HOMERO X. SANANDRES, Defendant(s).	Index. No.: 19928 / 2008 Motion Date: 10/21/10 Cal. No.: 21 Motion Seq. No.: 2

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The following papers numbered 1 to 6 read on this motion for summary judgment on the issue of liability pursuant to CPLR 3212.

	Papers Numbered
Notice of Motion, Affirmation, Affidavit, Exhibits	1 - 4
Affirmation in Opposition Affidavit.....................	5 - 6

Upon the foregoing papers it is ordered that this motion is determined as follows:

The moving defendants assert that the plaintiff has not sustained a "serious injury" as a result of the accident which occurred May 1, 2008 as the plaintiff, a 33 year old women was crossing the street at the intersection of 49th Street and 2nd Avenue, in New York County., when she was struck by an automobile.

In order to maintain an action for personal injury in an automobile case a plaintiff must establish, after the defendant has properly demonstrated that it is an issue, that the plaintiff has sustained a "serious injury" which is defined as follows:

"Serious Injury" Insurance Law §5102(d)

In order to maintain an action for personal injury in an automobile case a plaintiff must establish that he has sustained a "serious injury" which is defined as follows:

> Serious injury means a personal injury which result in ... 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 constitutes 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.

Whether a plaintiff has sustained a serious injury is initially a question of law for the Court (*Licari v Elliott,* 57 NY2d 230). Initially it is defendant's obligation to demonstrate that the plaintiff has not sustained a "serious injury" by submitting affidavits or affirmations of its medical experts who have examined the litigant and have found no objective medical findings which support the plaintiff's claim (*Toure v Avis Rent A Car Systems, Inc.,* 98 NY2d 345; *Lowe v Bennett,* 122 AD3d 718 *aff'd* 69 NY2d 701; Grossman *v Wright,* 268 AD2d 79). If the defendant 's motion raises the issue as to whether the plaintiff has sustained a "serious injury" the burden shifts to the plaintiff to prima facie demonstrate through the production of evidence sufficient to demonstrate the existence of a "serious injury" in admissible form, or at least that there are questions of fact as to whether plaintiff suffered such injury (*Gaddy v Eyler,* 79 NY2d 955; *Bryan v Brancato,* 213 AD2d 577).

Insurance Law 5102 is the legislative attempt to "weed out frivolous claims and limit recovery to serious injuries" (*Toure v Avis Rent-A-Car Systems, Inc.,* 98 NY2d 345, 350).

Under Insurance Law 5102(d) a permanent consequential limitation of use of a body organ or member qualifies as a "serious injury", however, the medical proof must establish that the plaintiff suffered a permanent limitation that is not minor slight, but rather, is consequential, which is defined as an important or significant limitation.

The defendants offer the affirmation of Dr. Maria Audrie DeJesus, M.D., a Neurologist, dated August 3, 2009 and an addendum dated March 22, 2010. Dr. DeJesus found that "[f]rom a neurological point of view, there is no evidence of permanency or disability. The claimant may work and may perform all normal activities of daily living with no restrictions. Normal neurological exam with no evidence of radiculopathy by objective testing on today's physical exam." In her addendum, which appears to have been generated by the defendants request for her to "issue an addendum pertaining [to] the supplemental bill of particulars" which were provided for her review, she states that "the claimant sustained cervical and lumbar sprain/strain that has resolved and does not require further neurological treatment. Her prognosis is good. From a neurological point of view, there is no evidence of permanency or residual effect."

There is an affirmation by Dr. Jacquelin Emmanuel, M.D., a Board Certified Orthopedic Surgeon, dated August 3, 2009 and an addendum dated March 22, 2010. The doctor notes that the plaintiff had complaints about neck and lower back pain when she was examined. Dr. Emmanuel

conducted an examination of the plaintiff's cervical spine, right shoulder, right elbow and lumbosacral spine. All tests demonstrated that plaintiff had a normal range of motion. It is noted that Dr. Emmanuel stated "[s]itting lasegue testing is negative to 80 degrees. Straight leg raising is negative to 75 degrees in both the seated and supine positions." No "normal" reading was stated. Dr. Emmanuel found that "[t]here are no objective findings of disability or permanency. The claimant is currently working and may continue to work and perform her activities of daily living with no restrictions. Prognosis is good." In Dr. Emmanuel's addendum she notes that after reviewing the supplemental bill of particulars "it is noted that the claimant received cervical and lumbar spine epidural injection and underwent a debridement of right lateral epicondylitis. I would not be able to determine the claimant['s] condition after the surgery." Dr. Emmanuel again reiterated her initial finding that at the time of the physical examination of the plaintiff she had no "objective findings of disability or permanency."

The defendants submit the three affirmations of Dr. A. Robert Tantleff, M.D., a Radiologist, each dated June 5, 2009 , relating the plaintiff's MRI of her Cervical Spine, Lumbar Spine, and Right Elbow. With regard to the plaintiff's lumbar spine he found "degenerative disc herniations" C5/6 which he found to be the result of "degenerative disc disease." With regard to his study of the plaintiff's lumbar spine he found discogenic changes at L4/5 and L5/S1. He found that these discogenic changes were "unrelated to the date of incident." Dr. Tantleff found the MRI of the plaintiff's right elbow to be "normal and unremarkable."

Here the defendant has come forward with sufficient evidence to support his claim that the plaintiff has not sustained a "serious injury" (*Gaddy v Eyler,* 79 NY2d 955).

The plaintiff relies on the affirmations by Dr. Aric Hausknecht, M.D., a Board Certified Neurologist dated May 8, 2008, June 5, 2008 and July 3, 2008. On May 8, 2008 Dr. Hausknecht found the plaintiff to have cervical derangement, thoracolumbar derangement, and right elbow arthropathy. Dr. Hausknecht sent the plaintiff for an MRI which was held May 17, 2008 which showed herniations at L4-5 and L5-S1. Dr. Hausknecht sent the plaintiff for an MRI which was held May 23, 2008 which showed herniations at C5-6 and C6-7. Dr. Hausknecht in his June 5, 2008 affirmation indicates that the plaintiff "is totally disabled" as was his finding on July 3, 2008.

The plaintiff relies on an affidavit of Dr. Keith Williams, D.C., a chiropractor, dated September 2, 2010. Dr. Williams recites that the plaintiff's care by him commenced July 16, 2008, after she received treatment from Dr. Joyce Goldenberg, M.D. from May 7, 2008 through July 16, 2008. Dr. Williams found that "for the first six months of my treatment of plaintiff, I determined that she was totally disabled ... [and] not participate in any of her usual and customary activities." Dr. Williams tested the plaintiff's cervical and lumbar range of motion with a goniometer on July 16, 2008 and on August 30, 2010. It is Dr. William's opinion that "the patient has not recovered from her injuries" despite medical and chiropractic treatment. It is Dr. William's opinion with a reasonable degree of chiropractic certainty that the plaintiff "has sustained a significant loss of the range of motion in the cervical and lumbar spine as well as the right elbow" due to the accident and that these injuries "have continued from the date of accident until the present without more than palliative relief" from various physicians.

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There is a "Radiologist's Affirmation" dated July 16, 2010 by Dr. Karl L. Hussman, M.D., a radiologist who relates that he examined the MRI of the plaintiff's Lumbar Spine, Cervical Spine, and Right Elbow. He relates his observations based on the study of the MRI examinations that "with the reasonable degree of medical certainty that the aforementioned analysis is accurate." Attached are the three MRI reports of his.

The plaintiff submits copies of medical documents allegedly from the NYU School of Medicine which are not affirmed as well as a letter from Dr. Sebastian Lattuga, M.D. which is also not affirmed.

The plaintiff submits the records of Dr. Arden M. Kaisman, M.D., kept in the regular course of business. The records relate to steroid injections given to the plaintiff on August 5, 2009, August 31, 2009, September 14, 2009, September 30, 2009, October 14, 2009 as well as x-rays. The treatment related to cervical and lumbar steroid injections given to the plaintiff.

To establish that the plaintiff has suffered a permanent or consequential limitation of use of a body organ or member and/or a significant limitation of use of a body function or system, the plaintiff must demonstrate more than "a mild, minor or slight limitation of use" and is required to provide objective medical evidence of the extent or degree of limitation and its duration (*Booker v Miller,* 258 AD2d 783; *Burnett v Miller,* 255 AD2d 541). Resolution of the issue of whether "serious injury" has been sustained involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part (*Dufel v Green,* 84 NY2d 795). Upon examination of the papers and exhibits submitted this Court finds that the plaintiff has raised triable factual issues as to whether the plaintiff has "permanent consequential" and "significant limitation" categories. The plaintiff has sustained such injury based on the affidavits and affirmations submitted. The plaintiff relies on Dr. Hausknecht opinion that the plaintiff is "totally disabled".

Where a plaintiff alleges soft-tissue injury to the spine, range-of-motion testing is used to determine whether the plaintiff has sustained a "serious injury". In order to demonstrate that the plaintiff has not sustained a serious injury the defendant must initially demonstrate that the plaintiff's range-of-motion is "normal" (*Chiara v Dernago,* 70 AD3d 746 ; *Knopf v Sinetar,* 69 AD3d 809). Here the plaintiff has had both medical and chiropractic treatment for a period of years demonstrating that she has sustained a "serious injury".

The question presented as to the difference between the conflicting measurements of plaintiff's ability to move creates an issue of fact for the jury (*Martinez v Pioneer Transportation Corp.,* 48 AD3d 306). When the findings reported by one physician are assessed by application of the standard of "normal" stated by the other, the reports present "contradictory proof" (*Dettori v Molzon,* 306 AD2d 308). The use of the word "normal" should not differ between physicians (*Ortiz v S&A Taxi Corp,* 68 AD3d 734).

Generally, an unexplained cessation of medical treatment may be fatal to the plaintiff's claim of a significant or permanent consequential limitation *(Baez v Rahamatali,* 24 AD3d 256 *aff'd* 6

NY2d 868) A diagnosis of permanency having been sustained by the plaintiff obviates the need for further treatment and, therefore, there is no "gap" in treatment (*Pommells v Perez,* 4 NY3d 566). Also, a finding by the treating physician that continued treatment would be merely palliative can be considered a sufficient explanation for cessation of treatment (*Toure v Avis Rent A Car Systems,* 98 NY2d 345; *Turner-Brewster v Arce,* 17 AD3d 189). Dr. Williams indicated that treatment of the plaintiff is palliative.

With regard to the 90/180 rule, the defendant's medical expert must relate specifically to the 90/180 claim made by the plaintiff before dismissal is appropriate (*See, Marmer v IF USA Express, Inc.,* 73 AD3d 868; *Scinto v Hoyte,* 57 AD3d 646; *Faun Thau v Butt,* 34 AD3d 447; *Lowell v Peters,* 3 AD3d 778). However, upon the defendant's properly raising this issue the plaintiff must submit competent medical evidence that the injuries sustained rendered him unable to perform substantially all of his daily activities for not less than 90 days of the first 180 days subsequent to the subject accident (*Vicers v Francis,* 63 AD3d 1150; *Roman v Fast Lane Car Service, Inc,* 46 AD3d 535). The plaintiff has submitted the affidavit of Dr. Williams dated September 2, 2010 indicating that she was totally disabled for six months.

Regarding the "permanent loss of use" of a body organ, member or system the plaintiff must demonstrate a total and complete disability which will continue without recovery, or with intermittent disability for the duration of the plaintiff's life (*Oberly v Bangs Ambulance, Inc.,* 96 NY2d 295). The finding of "Permanency" is established by submission of a recent examination (*Melino v Lauster,* 195 AD2d 653 *aff'd* 82 NY2d 828). Merely referring to the plaintiff's "subjective quality of the plaintiff's pain does not fall within the objective definition of serious physical injury" (*Saladino v Meury,* 193 AD2d 727, *see, Craft v Brantuk,* 195 AD2d 438). Here the plaintiff has submitted objective medical and chiropractic affirmations and affidavits demonstrating the permanency of the plaintiff's injury.

Regarding "permanent limitation" of a body organ, member or system the plaintiff must demonstrate that he has sustained such permanent limitation (*Mickelson v Padang,* 237 AD2d 495). The word "permanent" is by itself insufficient, and it can be sustained only with proof that the limitation is not "minor mild, or slight" but rather "consequential" (*Gaddy v Eyler,* 79 NY2d 955). Once the question has been raised, in order for the plaintiff to sustain proof of permanency, he must demonstrate the existence of such injury through objective medical tests which demonstrate the duration and extent of the injuries alleged (*Gobas v Dowigiallo,* 287 AD2d 690). The plaintiff has submitted sufficient evidence to raise the issue as to the permanency of her injury.

The "significant limitation of use of a body function or system" requires proof of the significance of the limitation, as well as its duration (*Dufel v Green,* 84 NY2d 795; *Fung v Uddin,* 60 AD3d 992; *Hoxha v McEachern,* 42 AD3d 433; *Barrett v Howland,* 202 AD2d 383).

The unaffirmed medical reports of a physician are without any probative value and therefore may not be considered (*Grasso v Angerami,* 79 NY2d 813; *Maffei v Santiago,* 63AD3d 1011; *Niles v Lam Pakie Ho,* 61 AD3d 657). The report must indicate that its contents are made under penalty of perjury in order to be admissible (*Niazov v Corlean Cab Corp,* 71 AD3d 749).

Accordingly, after considering all the evidence submitted the defendants' motion to dismiss is denied. The plaintiff has demonstrated that there is reason to believe that she has sustained a "serious injury" as it is defined in Insurance Law 5102.

So Ordered.

Dated: October 26, 2010
Long Island City, NY

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Robert J. McDonald, J.S.C.