

Guzman v Armstrong

2010 NY Slip Op 33336(U)

November 15, 2010

Supreme Court, Suffolk County

Docket Number: 22939/2007

Judge: William B. Rebolini

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

COPY

PRESENT:**WILLIAM B. REBOLINI**
Justice

Gloria Guzman and Hegla Guzman,

Plaintiffs,

-against-

Karen Armstrong and Chevelle Zeigler,

Defendants.

Motion Sequence No.: 001; MG
CDISPOMotion Date: 8/25/10Submitted: 8/25/10Index No.: 22939/2007Attorney for Plaintiff:John J. Spano, Esq.
1940 Deer Park Avenue, #267
Deer Park, NY 11729Attorney for Defendants:Finning, Carcagno & Santander
90 Broad Street, Suite 1203
New York, NY 10004Clerk of the Court

Upon the following papers numbered 1 to 15 read upon this motion for summary judgment:
Notice of Motion and supporting papers, 1 - 15.

The instant action seeks to recover damages for personal injuries arising from a motor vehicle accident which occurred on August 11, 2004 at the intersection of Stockton Street and Jefferson Avenue in Brentwood, New York. The accident purportedly occurred when a vehicle owned by defendant Karen Armstrong and operated by defendant Chevelle Zeigler collided with a vehicle operated by plaintiff Gloria Guzman (hereinafter Gloria). Plaintiff Hegla Guzman (hereinafter Hegla) was a passenger in Gloria's vehicle at the time of the accident. The complaint alleges that the plaintiffs sustained serious and permanent injuries as a result of the defendant's negligence in causing the accident. Specifically, the bill of particulars alleges that Hegla sustained serious and permanent injuries including posterior central disc herniations at C4/5 and C5/6, indenting the ventral CSF space; reversal of the cervical lordosis; L4/5 and L5/S1 posterior disc bulges; C5/6 radiculopathy; lumbosacral radiculitis; post traumatic cervical, thoracic and lumbar sprain/strain

syndrome; and chronic decreased ranges of motion of the cervical, thoracic and lumbar spinal regions. The bill of particulars alleges that Gloria sustained serious and permanent injuries including posterior subligamentous disc bulges at C5/6 indenting the ventral CSF space; kyphotic lumbar curvature compatible with reflex muscle spasm; L2/3 through L5/S1 posterior subligamentous disc bulges; cervical and lumbar radiculitis; post traumatic cervical, thoracic and lumbar sprain/strain syndrome; left knee contusion and derangement; left ankle and foot sprain; right wrist sprain; deltoid ligament ankle sprain; tarsometatarsal joint ligament sprain; traumatic neuritis of deep peroneal nerve; and chronic decreased ranges of motion of the cervical, thoracic and lumbar spinal regions.

The defendants now move for summary judgment dismissing the complaint on the grounds that the plaintiffs' injuries do not meet the serious injury threshold requirement under Insurance Law Section §5102(d).

A "serious injury" is defined as 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 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" (Insurance Law §5102[d]). The Court of Appeals has held that the issue of whether a claimed injury falls within the statutory definition of a "serious injury" is a question of law for the courts in the first instance, which may properly be decided on a motion for summary judgment (see, Licari v. Elliott, 57 NY2d 230 [1982]; Charley v. Goss, 54 AD3d 569 [1st Dept., 2008]).

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (see, Alvarez v. Prospect Hosp., 68 NY2d 320 [1986]; Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851 [1985]; Zuckerman v. City of New York, 49 NY2d 557 [1980]). In a motor vehicle case, a defendant moving for summary judgment on the issue of whether the plaintiff sustained a serious injury has the initial burden of presenting competent evidence establishing that the injuries do not meet the threshold (see, Pagano v. Kingsbury, 182 AD2d 268 [2nd Dept., 1992]). Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (see, Alvarez v. Prospect Hosp., 68 NY2d 320 [1986]; Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851 [1985]). Once this showing has been made, however, the burden shifts to the plaintiff to produce evidentiary proof in admissible form sufficient 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 (see, Gaddy v. Eyler, 79 NY2d 955 [1992]; Grossman v. Wright, 268 AD2d 79 [2nd Dept., 2000]; Pagano v. Kingsbury, 182 AD2d 268 [2nd Dept., 1992]; see also, Alvarez v. Prospect Hosp., 68 NY2d 320 [1986]; Zuckerman v. City of New York, 49 NY2d 557 [1980]).

The evidence submitted by the defendants established their *prima facie* entitlement to summary judgment dismissing the complaint by demonstrating that the plaintiffs did not sustain a serious injury within the meaning of Insurance Law §5102(d) as a result of the subject accident (see, Toure v. Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v. Eyler, 79 NY2d 955 [1992]; Saetia v. VIP Renovations Corp., 68 AD3d 1092 [2nd Dept., 2009]; Dietrich v. Puff Cab Corp., 63 AD3d 778 [2nd Dept., 2009]; DiFilippo v. Jones, 22 AD3d 788 [2nd Dept., 2005]; Casella v. N.Y. City Transit Auth., 14 AD3d 585 [2nd Dept., 2005]).

The evidence submitted was sufficient to establish that plaintiff Hegla did not sustain a serious injury as a result of the subject accident. In support of this branch of their motion, the defendants submitted, *inter alia*, the affirmed report of Edward Weiland, M.D., the affirmed report of David Benatar M.D., affirmed reports prepared by Jonathan Lerner, M.D. with respect to MRIs performed on Hegla's lumbar and cervical spine and Hegla's deposition testimony. Dr. Weiland examined Hegla on July 16, 2009. He examined her cervical spine and lumbar spine and found no paraspinal muscle spasm or vertebral body percussion tenderness. He measured the range of motion of her cervical spine, lumbar spine and shoulders, compared his findings to normal values and found her range of motion to be normal in all respects. He found Lasegue's Maneuver to be unlimited at 90 degrees. Fabere-Patrick sign and Adson's Maneuver were negative. Lhermitte's test was absent. Soto-Hall sign and Kemp's Test were negative. He concluded that Hegla had sustained cervical, thoracic and lumbosacral sprains/strains which had resolved. He found there was no reason why, from a neurological perspective, she would be unable to perform activities of daily living and return to gainful employment activities without restriction. He concluded there was no primary neurologic disability present as related to the injuries purportedly sustained in the accident.

Dr. Benatar examined Hegla on December 19, 2008. He measured the range of motion of her cervical spine and thoracolumbar spine, compared it to normal values and found it to be normal in all respects with the exception of a slight limitation in her thoracolumbar flexion. He obtained negative results on the straight leg raise. He found that testing in the cervical and lumbar spine for myelopathy and testing for radiculopathy was negative. He concluded that Helga had sustained cervical sprain/strain, thoracic sprain/strain, lumbar sprain/strain and that such injuries had resolved. He concluded that there was no permanency related to the accident, that she is able to work and that she did not require any further intervention from an orthopedic perspective.

Dr. Lerner reviewed MRI exams performed on Hegla's lumbar spine on September 8, 2004 and December 3, 2004. He averred that the September 8, 2004 MRI showed bulges and dessication at L4/5 and L5/S1 which was consistent with degenerative disc disease and suggestive of a chronic degenerative process as opposed to an acute traumatic event. He concluded that the findings of the MRI had no causal relationship to the subject accident. Dr. Lerner averred that the MRI of Helga's lumbar spine performed on December 3, 2004 showed no significant interval change in comparison to the prior study.

Dr. Lerner reviewed MRI exams performed on Hegla's cervical spine on September 7, 2004 and November 19, 2004. He averred that the September 7, 2004 study showed small central disc osteophyte complexes and dessication at C4/5 and C5/6, which was consistent with degenerative disc disease and suggestive of a chronic degenerative process as opposed to an acute traumatic event. He concluded that the findings of the MRI had no causal relationship to the subject accident. Dr. Lerner averred that the MRI of Helga's cervical spine performed on November 19, 2004 showed no significant interval change in comparison to the prior study.

During her deposition, Hegla testified that she first sought medical treatment the day following the accident for pain in her neck, back and legs. She began treating with chiropractor Michelle Lester and estimated that she treated with Dr. Lester for one year. She began treating four times a week, then decreased treatments to three times a week and, at the end, treated approximately once a month. She also treated with her primary physician for the injuries she sustained in the accident. The last doctor she recalled seeing for her injuries was Dr. Lester, a little over one year prior to her deposition. Hegla testified that she does not have any future medical appointments scheduled because she does not have insurance. She testified that the pain in her back and neck got better following the accident, but that every once in a while they return. She experiences pain in her back and neck when it gets cold out. She can no longer lift her daughter up because it hurts her neck. Hegla testified that she returned to work two days after the accident and that at some time thereafter, was promoted.

The evidence submitted was also sufficient to establish that plaintiff Gloria did not sustain a serious injury as a result of the subject accident. In support of this branch of their motion, the defendants submitted, *inter alia*, the affirmed report of Edward Weiland, M.D., the affirmed report of David Benatar, M.D., the affirmed reports of Jonathan Lerner, M.D. with respect to MRIs performed on Gloria's cervical spine, lumbar spine, left shoulder and right wrist, and Gloria's deposition testimony. Dr. Weiland examined Gloria on July 16, 2009. Upon examination of Gloria's cervical spine and lumbar spine he found no paraspinal muscle spasm or vertebral body percussion tenderness. He measured the range of motion of Gloria's cervical spine, lumbar spine and shoulders, compared it to normal values and found it to be normal in all respects. He found Straight leg raising to be unlimited at 90 degrees and no sciatic notch tenderness. Fabere-Patrick sign and Adson's Maneuver were negative. With respect to her left foot and ankle, he stated there was full range of motion, no joint crepitus or effusion, and that Tinel's sign was absent. He found full range of motion in both knees. He concluded that Gloria sustained cervical, thoracic and lumbosacral sprains/strains and that such injuries were resolved. He found that the reported history of contusions to the left foot, left ankle and knees were also resolved. He found the plaintiff had a normal neurologic examination. He concluded that, from a neurological perspective, she could perform activities of daily living and return to gainful employment activities without restrictions. He concluded that Gloria had no primary neurological disability as related to her reported injuries.

Dr. Benatar examined Gloria on December 19, 2008. He measured the range of motion of her thoracolumbar spine, cervical spine and thoracic spine, compared the ranges of motion to normal values and found her range of motion to be normal in all respects with the exception of a slight

limitation in her thoracolumbar flexion. He found that provocative testing for radiculopathy and myelopathy were negative and that the straight leg raising test was negative. Dr. Benatar examined Gloria's right wrist. He noted that she complained of diffuse tenderness in no specific area. He measured her range of motion, compared it to normal values and found it to be normal in all respects. He found no crepitus and no deformity. De Quervain's testing was negative and carpal tunnel testing was negative. On examination of Gloria's shoulders, he noted that she complained of tenderness. He found the examinations were symmetrical. He measured the range of motion, compared it to normal and found it to be normal in all respects. He found that impingement testing and stability testing were both negative bilaterally. Yergason's was negative. Upon examination of Gloria's knees, Dr. Benatar noted that the examination was symmetric. He noted that she complained of knee pain, but that there was no joint line tenderness. He measured her range of motion, compared it to normal values and found the range of motion of her knees to be normal in all respects. He found negative patellar apprehension and negative effusion. Lastly, on examination of Gloria's left foot he found it to be nontender. He found Anterior drawer to be negative for instability and pain. He measured the range of motion of her ankles, compared it to normal values and found it to be normal in all respects. His impression was that the plaintiff had sustained sprains to her left foot and ankle, right wrist, left shoulder, cervical spine, thoracic spine and lumbar spine and that all of these injuries had resolved. He concluded that there was no permanency related to the accident and that no further intervention was necessary from an orthopedic perspective.

Dr. Lerner averred that he review MRIs performed on Gloria's cervical spine on September 3, 2004 and November 19, 2004. He concluded that the September 3, 2004 MRI showed a central disc osteophyte complex at C5/6 and dessication which was consistent with degenerative disc disease and suggestive of a chronic degenerative process as opposed to an acute traumatic event. He concluded that there was no causal relationship between the findings of the MRI and the accident. Dr. Lerner averred that the November 19, 2004 MRI of Gloria's cervical spine showed no change in comparison to the prior study.

Dr. Lerner examined the MRIs of Gloria's lumbar spine performed on September 8, 2004 and November 12, 2004. He averred that the MRI performed on September 8, 2004 showed focal central disc bulges with mild effacement of the thecal sac at L3/4, L4/5 and L5/S1 and dessication of the L3/4 through L5/S1 intervertebral disc space. This finding is consistent with degenerative disc disease and suggestive of a chronic degenerative process as opposed to an acute traumatic event. He concluded that the finding of the MRI revealed no causal relationship with the accident. Dr. Lerner found that the lumbar spine MRI performed on November 12, 2004 showed no change from the prior study.

Dr. Lerner affirmed that the MRI of Gloria's left shoulder performed on December 3, 2004 showed thickening and signal heterogeneity within the supraspinatus tendon consistent with tendinosis. He found no evidence of a discrete tendon tear. He noted the presence of mild hypertrophic osteoarthritic changes at the acromioclavicular joint space with associated marrow edema. He found that this suggests early manifestations of rotator cuff impingement syndrome,

Guzman v. Armstrong
 Index No.: 22939/2007
 Page No. 6

which is a chronic degenerative process as opposed to an acute traumatic event. He concluded that the findings of the MRI showed no causal relationship to the subject accident.

Dr. Lerner examined the MRI of Gloria's right wrist performed on October 4, 2004 and found that it was "unremarkable." He found that the findings of the MRI had no causal relationship to the subject accident.


During her deposition, Gloria testified that immediately following the accident she had pain in her foot, back and neck. The following day she went and received medical treatment from Dr. Lester. She estimated that she treated with Dr. Lester for a year. When she first began treatment, she treated four times a week. She later decreased her treatment to three times a week and then to two times a week. Dr. Lester referred her for MRIs and referred her to a foot specialist. She also saw her primary care physician for the injuries she sustained in the accident. She continues to go to her primary care physician whenever she feels pain. Her last visit to her primary care doctor was approximately three months prior. As a result of the accident, she can no longer study for long periods of time, stand for long periods of time, or do heavy work. Gloria testified that she was employed operating machines at the time of the accident and that she went to work two days following the accident. She was later promoted to supervisor.

In opposition to the defendants' *prima facie* showing, it was incumbent upon the plaintiffs to demonstrate, by the submission of objective proof of the nature and degree of the injury, that they did sustain a "serious" injury as a result of the instant accident, or that there are questions of fact as to whether they sustained such an injury as a result of the subject accident (see, Toure v. Avis Rent A Car Sys., 98 NY2d 345 [2002] at 350; Charley v. Goss, 54 AD3d 569 [1st Dept., 2008]). As the plaintiffs have failed to submit any opposition to the instant motion, they have failed to meet this burden.

Accordingly, it is

ORDERED that the unopposed motion by the defendants for summary judgment dismissing the complaint is granted.

Dated: November 15, 2010


 HON. WILLIAM B. REBOLINI, J.S.C.

 X FINAL DISPOSITION NON-FINAL DISPOSITION