

Colatorti v Bogart

2011 NY Slip Op 30448(U)

February 9, 2011

Sup Ct, Nassau County

Docket Number: 15485/09

Judge: Thomas P. Phelan

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SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice

TRIAL/IAS PART 2
NASSAU COUNTY

CHRISTINA COLATORTI,

Plaintiff(s),

-against-

JORDANA S. BOGART,

Defendant(s).

ORIGINAL RETURN DATE: 09/20/10
SUBMISSION DATE: 12/06/10
INDEX No.: 15485/09

MOTION SEQUENCE #2

The following papers read on this motion:

Notice of Motion.....	1
Answering Papers.....	2
Reply.....	3

Defendant's motion for an order, pursuant to CPLR 3212, granting summary judgment dismissing plaintiff's complaint based upon the ground that plaintiff failed to sustain a serious injury as required under New York Insurance Law § 5102(d) is denied.

This is an action to recover damages for personal injuries allegedly sustained as a result of the negligence of the defendant in a motor vehicle accident which occurred on or about October 23, 2008. The record reveals that plaintiff had a prior motor vehicle accident; plaintiff claims she did not sustain any injuries as a result of that accident.

Defendant alleges that the affirmed report of Isaac Cohen, M.D., as well as the Emergency Room reports of North Shore University Hospital and the deposition testimony of plaintiff, do not disclose the presence of a serious injury. It is submitted that plaintiff does not suffer from permanent consequential limitations or significant limitations. To meet the threshold "significant limitation of use of a body function or system" or "permanent consequential limitation of a body organ or member" categories, the law requires that the limitation be more than minor, mild or slight and that the claim be supported by medical proof based upon credible medical evidence of an objectively measured and quantified medical injury or condition (*Gaddy v. Eyster*, 79 NY2d 955 [1992]; *Licari v. Elliot*, 57 NY2d 230 [1982]).

Plaintiff's complaints, as alleged in her Bill of Particulars, consist of the following:

- A. ANTERIOR LABRAL TEAR OF THE RIGHT SHOULDER;
- B. EFFUSIONS OF THE AC AND GLENOHUMERAL JOINTS INCLUDING FLUID POOLING IN THE SUBCORACOID SPACE OF THE RIGHT SHOULDER;
- C. TENOSYNOVITIS OF THE LONG HEAD ;
- D. INTERNAL DERANGEMENT OF THE RIGHT SHOULDER;
- E. ABNORMAL ELECTRODIAGNOSTIC STUDY OF THE UPPER EXTREMITIES INDICATIVE OF T1 RADICULOPATHY ON THE RIGHT AND MEDIAN NERVE ENTRAPMENT NEUROPATHY;
- F. REVERSAL OF NORMAL CERVICAL LORDOSIS DUE TO MUSCLE SPASM (Def's Ex. D).

Plaintiff sought emergency room treatment at North Shore University Hospital after the subject accident. No x-rays were taken at that time. Plaintiff was diagnosed with musculoskeletal pain and prescribed ibuprofen. Plaintiff was advised to follow up with her medical doctor in one to two days.

In his report dated March 10, 2010, Dr. Cohen, a board certified orthopedic surgeon, states that he conducted range of motion testing of the cervical spine and right shoulder using a goniometer. His findings were that they were within normal limits. Dr. Cohen's diagnosis was:

- 1. Status post motor vehicle accident
- 2. Cervical strain, resolved
- 3. Right shoulder contusion, resolved (Def's Ex. G).

At the time of the examination plaintiff stated to Dr. Cohen that she was still undergoing chiropractic treatment. Upon examination of the right shoulder, Dr. Cohen noted a "clicking, snapping sensation" with similar findings in the left shoulder but less intense. Dr. Cohen opined that plaintiff "has satisfactory resolution of the initial soft tissue complaints without any evidence of active disability documented. She has full functional capacity of the cervical spine area, as well as the right shoulder with a normal neurological examination of both upper extremities, as documented. No evidence of sequelae or permanency can be documented" (Id.). Dr. Cohen also noted that the MRI examination of the left shoulder demonstrated a questionable labrum tear and deferred to the appropriate specialist "her pituitary condition and the risk related to shoulder surgery" (Id.).

Plaintiff testified at her deposition that she missed three days from work as a result of this accident (Def's Ex. F, p. 49). Based upon this testimony, defendant concludes that plaintiff was not prevented from performing all of her usual and customary activities for 90 out of the first 180 days following the accident.

Where, as here, defendant has provided evidence demonstrating the lack of serious injury, the burden shifts to plaintiff to present sufficient evidence to defeat the motion (*see, Gaddy v. Eyer*, 79 NY2d 955 [1992]; *Tabacco v. Kaster*, 229 AD2d 526 [2d Dept. 1996]). “To defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial and must make his showing by producing evidentiary proof in admissible form (citation omitted)” (*Seyfeid v. Greenspan*, 92 AD2d 563, 564 [2d Dept. 1983]; *see, Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]).

In opposition, plaintiff submits the affirmation of Harshad C. Bhatt, M.D., an orthopedist, the affirmed reports of Alan B. Greenfield, M.D., Michle Rubin, M.D., Eric S. Roth, M.D. and Hormozan Aprin, M.D. and the unaffirmed report of Nicky Bhatia, M.D., as well as the affidavit of plaintiff. Since the EMG report prepared by Dr. Bhatia was unaffirmed it is without any probative value (*Endzweig-Morov v. MV Transp., Inc.*, 50 AD3d 946, 947 [2d Dept. 2008]).

Plaintiff first presented to the office of Harshad C. Bhatt, M.D. on December 9, 2008. Physical examination revealed decreased range of motion of the right shoulder. Dr. Bhatt’s clinical impression was:

1. Internal derangement of right shoulder
2. Tendonitis suprapinatus tendon.
3. Labral tear right shoulder. (Pl’s Ex. B).

Dr. Bhatt noted that all of the injuries were causally related to the accident of October 23, 2008, and that plaintiff is partially disabled with a guarded prognosis (*Id.*). Surgery was recommended to repair the labral tear. Dr. Bhatt opined that without surgery, plaintiff “will continue to suffer from pain and clicking and will eventually develop irreversible arthritis” (Bhatt Aff. ¶5).

Upon further examination on October 14, 2010, Dr. Bhatt opined that plaintiff still suffers from traumatic injuries to the right shoulder and cervical spine, that these injuries are permanent in nature and a proximate result fo the October 23, 2008, accident.

On January 29, 2009, Eric S. Roth, MD, conducted an independent physiatric medical examination on plaintiff. The examination included an orthopedic examination of the cervical spine and right shoulder. With regard to range of motion testing, Dr. Roth stated that the “maneuvers were performed with suboptimal effort due to a complaint of pain” (Pl’s Ex. I). His diagnosis was:

- 1) Cervical spine sprain, resolving.
- 2) Right shoulder sprain, resolving. (*Id.*)

Dr. Roth opined that the plaintiff’s condition was expected to stabilize in four weeks (*Id.*)

After conducting an orthopaedic independent medical examination of plaintiff on May 6, 2009, Dr. Aprin rendered the following diagnosis:

- Sprain/strain of the cervical spine, resolved.
- Myofascial thoracic pain.
- Sprain/strain of the right shoulder with anterior labral tear (per MRI report dated 12/6/08). (Pl's Ex. J).

Dr. Aprin opined that plaintiff was "able to return to preloss activity levels" but that "a time frame cannot be established for stabilization of the claimant's injuries that she sustained in the 10/23/2008 accident" and that plaintiff "needs further treatment" (Id.).

Although both Dr. Bhatt's affirmation and Dr. Roth's affirmed report revealed restrictions of motion as a result of range of motion testing, there is no indication of the method used to measure the range. "[T]he failure of plaintiff's medical expert to demonstrate the objective tests performed to determine the loss of range of motion renders these numerical findings insufficient to demonstrate serious injury" (*Parreno v. Jumbo Trucking, Inc.*, 40 AD3d 520 [1st Dept. 2007]).

The affirmed MRI report of Alan B. Greenfield M.D. concerning plaintiff's right shoulder reveals apparent anterior labral tear, which should be correlated clinically; effusions of the AC and glenohumeral joints, including fluid pooling in the subcoracoid space and long head of biceps tenosynovitis (Pl's Ex. E). Dr. Rubin's impression of the MRI of plaintiff's cervical spine was:

1. Left uncovertebral spurring at C3-C4, which results in:
 - a) mass effect on the left anterolateral thecal sac.
 - b) left foraminal encroachment.
2. Left uncovertebral spurring at C4-C5, with left foraminal encroachment.
3. Loss of the normal cervical lordosis, likely related to muscle spasm/pain.
4. Possible retention cyst/polyp, left maxillary sinus. (Pl's Ex. F).

Defendant's arguments that the MRI reports are insufficient are unavailing as her expert referenced these very same reports (*see, McFarland v. Irizarry*, 26 Misc.3d 1224(A) (Civ. Ct., Bronx Co., 2010)). The court finds plaintiff's submissions sufficient to raise a triable issue of act, especially in light of defendant's expert's questioning the labrum tear.

Based upon all of the foregoing, plaintiff's motion is denied.

This decision constitutes the order of the court.

Dated: 2-9-11

ENTERED HON THOMAS P. PHELAN
 THOMAS P. PHELAN, J.S.C.

FEB 15 2011

**NASSAU COUNTY
 COUNTY CLERK'S OFFICE**

RE: COLATORTI v. BOGART

Page 5.

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