

Patterson v Buzard

2011 NY Slip Op 30788(U)

March 21, 2011

Sup Ct, Nassau County

Docket Number: 1455/08

Judge: Roy S. Mahon

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SCW

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON
Justice

DAHLIA PATTERSON,

TRIAL/IAS PART 6

INDEX NO. 1455/08

Plaintiff(s),

**MOTION SEQUENCE
NO. 1**

- against -

OLIVIA ELLEN BUZARD,

**MOTION SUBMISSION
DATE: January 19, 2011**

Defendant(s).

The following papers read on this motion:

- Notice of Motion** **X**
- Affirmation in Opposition** **X**
- Memorandum of Law** **X**

Upon the foregoing papers, the motion by the 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:

This personal injury action arises out of a rear-end motor vehicle accident that occurred on January 24, 2005 at approximately 8:00 pm on Ocean Avenue at or near Lakeview Avenue.

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

"As a result of the occurrence, the Plaintiff Dahlia Patterson sustained the following personal injuries, all of which are alleged to be of a permanent nature:

- Broad Based Disc Bulge at L4-5
- Reversal of the Cervical Lordosis
- Focal Disc Bulge at C4-5
- Range of Motion deficit 4/27/05
- Cervical Spine
- Flexion 20/50
- Extension 30/60
- Right Rotation 60/80

Left Rotation 50/80
Lumbar Spine
Flexion 30/60
Extension 20/25
Right Lateral Bending 10/25
Left Lateral Bending 10/25
Paraspinal Muscle Spasm in Lumbar and Cervical Spine
Post Traumatic Headache
Traumatic Lumbar Myofascial Pain with Radiculitis
Traumatic Cervical Myofascial Pain with Radiculitis

All of the aforementioned injuries, resulting disabilities, aggravations, exacerbations and involvements are associated with further soft tissue injuries to the areas traumatically affected, including: fracture, tearing, derangement and damage to the associated muscle groups, ligaments, tendons, cartilage, blood, tissue, epithelial tissue, all concomitant to the specific injuries and related to the specific portions of the body mentioned hereinabove, with resultant scars, hemorrhage, pain, ecchymosis, deformity and disability, stiffness, tenderness, weakness and partial restriction and limitation of motion, pain on motion and loss of use of the abovementioned parts, atrophy, anxiety and mental anguish, all of which have substantially prevented the Plaintiff from enjoying the normal fruits of social activities.

The Plaintiff reserves the right to prove any and all further consequences and any and all further medical expenses up to and at the time of trial.

Upon information and belief, all of the above injuries are permanent and continuing in nature, expect for objective signs of contusions and abrasions.

All of the injuries and conditions caused and/or contributed to the Plaintiff living a lesser quality of life, including loss of enjoyment of life than the Plaintiff would otherwise have experienced, but for the injuries and conditions alleged herein.

The Plaintiff suffered, still suffers, and upon information and belief will continue to suffer pain, discomfort and limited movement of the injured portions of her body, including the adjacent and surrounding muscles, tendons, nerves, joints, fascia, vessels and soft tissues."

The defendant in support of the defendant's application, amongst other things, submits an affirmed letter report dated August 2, 2010 of Steven Ender, D.O., a neurologist of a neurological examination conducted of the plaintiff on August 2, 2010; and a review of an MRI of the plaintiff's cervical spine performed on March 14, 2005 by Steven L. Mendelsohn, MD, a radiologist.

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."

The report of Dr. Ender sets forth:

"On examination, the claimant is 33-year old female who stands 5 feet 6 inches tall and weighs 160 pounds with dark brown hair and brown eyes. She is identified by a New York State Driver's License.

Mental Status: The claimant is awake, alert and oriented to person, place and time. Speech is fluent and without dysarthria. Language was intact.

Cranial Nerves: Visual fiends were full. Fundi are without papilledema. The pupils are equal, round and reactive. Extraolular muscles are intact. Facial sensation is intact to light touch and pinprick. There is no facial weakness

noted. Palate and tongue are in the midline. Sternocleidomastoid and trapezius muscle strength is 5/5 throughout.

Motor Examination: Strength is 5/5 throughout. Deep tendon reflexes are 1+ and symmetrical. Plantar response is flexor bilaterally. Tone and bulk are normal.

Sensory Examination: Pinprick and cold sensation is intact throughout.

Coordination Examination: Finger-to-nose and tandem gait were performed without ataxia.

Gait: The claimant has a narrow-based gait. The claimant can walk on heels and toes without weakness.

Musculoskeletal Examination: Measurements are made using a goniometer. Neck: Lateral rotation was performed to 80 degrees bilaterally (80 degrees being normal). Flexion and extension were performed to 45 degrees (45 degrees being normal). There is no cervical paraspinal muscle tenderness or spasm noted. Back: Straight leg raising is negative in the seated position. The claimant can flex her lumbar spine to 90 degrees (90 degrees being normal). There is no thoracic or lumbosacral paraspinal muscle spasm or tenderness.

Medical Records: The following medical records were reviewed.

1. A verified bill of particulars, dated October 7, 2008.
2. A chiropractic narrative report from Dr. Sean Sosnik, dated June 8, 2005. This reports the claimant was taken to South Nassau Hospital for treatment. X-rays and a CAT scan of the head were performed.
3. A neurological consultation report from Accurate Medical, P.C., performed on February 15, 2005, signed by Dr. Ahmed Eifky.
4. A chiropractic consultation report from Dr. Sean Sosnick, dated March 2, 2005. Follow up report from Dr. Sosnik from April 27, 2005, and a treatment log of dates of service from January 25, 2005 thru May 31, 2005.
5. A cervical spine MIR report from United Diagnostic Imaging, performed on March 14, 2005 read by Dr. Mark Shapiro.
6. A lumbosacral spine MRI report from United Diagnostic Imaging dated March 7, 2005 signed by Dr. Mark Shapiro.

Impression: Resolved cervical and lumbosacral paraspinal muscle strain. The claimant has a normal neurological examination. I find no residual neurological disability. She can continue with her current activities of daily living, as well as working full time without restrictions."

Dr. Mendelsohn's report of the review of the MIR of the plaintiff's Cervical Spine states:

"MRI OF THE CERVICAL SPINE:

MRI of the cervical spine was performed at United Diagnostic Imaging on 3-14-05.

Examination consists of sagittal T1 and T2 weighted, axial gradient echo pulse sequences. Examination is technically of fair quality.

Cervical discs maintain normal height, hydration signal and contour with no evidence of diffuse bulging or focal herniation.

Spinal canal is of normal caliber with no evidence of stenosis. Laterla recesses are well maintained. Neural foramina are patent throughout. Cervical cord is of normal caliber. Exiting nerve roots demonstrate no evidence of impingement.

Patient's head is lifted off the MRI table by a pillow producing straightening of the cervical lordotic curve. Vertebral body heights are preserved. Marrow signal characteristics are normal. There are no compression deformities. Paravertebral soft tissue structures appear normal.

I am in partial agreement with the interpretations provided by Dr. Mark Shapiro insofar as I neither of us finds evidence of a cervical disc herniation. Please note I find no evidence of bulging of the C4-5 disc.

CONCLUSION: STRAIGHTENING, CERVICAL LORDOSIS, DUE TO ELEVATION OF PATIENT'S HEAD BY A PILLOW.

OTHERWISE NORMAL MIR OF THE CERVICAL 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 her own affidavit; an unsworn and undated report of Accurate Medical PC by Armed Elfiky, MD, a neurologist and treating physician of the plaintiff of a neurological examination of the plaintiff conducted on February 15, 2005; an affidavit of Shawn Sosnik, a treating chiropractor of the plaintiff's incorporating certain chiropractic office records, and an affirmation of Mark Shapiro, MD a radiologist affirming a report of an MRI of the plaintiff's cervical spine and an MRI of the plaintiff's lumbar spine.

Based upon the fact that the report of Dr. Elfiky is not in admissible form, said report is not properly considered in opposition to the defendant's requested relief (**see, Grasso v Angerami, 79 NY2d 813, 580 NYS2d 178**).

Dr. Sosnik sets forth that the plaintiff treated with im from January 25, 2005 until May 31, 2005 and thereafter was seen on November 26, 2010. Dr. Sosnik offers no explanation for the over 5 year gap in

treatment (see, **Pommells v Perez**, 4 NY3d 566, 797 NYS2d 380; also see, **Nemchyonok v Pong Liv Ying**, 2 AD3d 421, 767 NYS2d 811).

As to Dr. Shapiro's reports, while the respective reports set forth a finding of disc bulges, neither of the reports causally relate the conditions found therein to the accident in issue (see, **Ukonu v Velazquez**, 213 AD2d 628, 624 NYS2d 195 (Second Dept., 1995)).

Based upon all of the following, 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 **granted**.

SO ORDERED.

DATED: 3/21/2011

..... *Roy S. Waller*
J.S.C.

ENTERED
MAR 25 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE