

Terrano v Porter

2012 NY Slip Op 30132(U)

January 10, 2012

Sup Ct, Nassau County

Docket Number: 21525/09

Judge: Thomas P. Phelan

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SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK

Present:
HON. THOMAS P. PHELAN,

Justice
TRIAL/IAS PART 2
NASSAU COUNTY

VICTORIA GONATAS TERRANO,

Plaintiff(s),

-against-

ORIGINAL RETURN DATE: 09/08/2011
SUBMISSION DATE: 11/10/2011
INDEX No.: 21525/09

MOTION SEQUENCE #1

TAMARA PORTER and MARVIN PORTER,

Defendant(s).

The following papers read on this motion:

Notice of Motion.....	1
Affirmation in Opposition.....	2
Reply Affirmation.....	3

Defendants' motion for an order, pursuant to CPLR 3212, granting summary judgment dismissing plaintiff's complaint based upon the ground that plaintiff has failed to sustain a serious injury as required under 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 defendants in the ownership and operation of their motor vehicle on or about October 26, 2006.

Defendants allege that plaintiff's injuries do not fall within the categories specified in Insurance Law § 5102(d) for a serious injury, although plaintiff claims in her Bill of Particulars that she suffered an injury resulting 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 prevented her from performing all of the material acts which constitute plaintiff's usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident.

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. Eycler*, 79 NY2d 955 [1992]; *Licari v. Elliot*, 57 NY2d 230 [1982]).

In support of their contentions that plaintiff has not sustained a serious injury, defendants submit the affirmed report of Chandra M. Sharma, M.D., a neurologist. Dr. Sharma examined plaintiff on February 25, 2011. Her affirmed report reveals that the examination of the cervical and lumbar spines were within normal ranges of motion (Ex. D). Her diagnosis was cervical and lumbar sprain/strain, resolved and normal neurological examination (Id.). Dr. Sharma commented that there were “no neurological limitations to continuation of usual work and activities of daily living. There are no neurological manifestations of disc bulges or disc herniations” (Id.)

Notwithstanding plaintiff’s contentions to the contrary, “the failure of a defendant’s medical expert to address the findings contained in MRI reports reviewed as part of his or her examination is academic in the face of that expert’s finding of a full range of motion and a lack of disabilities causally related to the motor vehicle accident (citation omitted)” (*Kearse v. New York City Transit Auth.*, 16 AD3d 45, 50 [2d Dept. 2005]).

Plaintiff testified at her deposition that she missed a week from work following the accident and another week thereafter (Ex. E, pp 10-11). Plaintiff, however, “did not submit any competent medical evidence to support her claim that she was unable to perform substantially all of her daily activities for not less than 90 of the 180 days immediately following the accident as a result of the subject accident (citations omitted)” (Id. at 52).

Where, as here, defendants have provided evidence demonstrating the lack of serious injury, the burden shifts to plaintiff to present sufficient evidence to defeat the motion (*see, Gaddy v. Eycler*, 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 her affidavit, as well as the affirmation of Sunil

H. Butani, M.D., a board-certified physical medicine rehabilitation physician, who initially examined the plaintiff on November 13, 2006 (Ex. B). Dr. Butani's impression was "that plaintiff suffered from internal derangement of the right knee with pain which was improving, cervical radiculopathy which persist[s] with severe pain of the cervical spine and low back pain also persists with severe pain across the spine" (Id. ¶ 3). Dr. Butani recommended physical therapy, which plaintiff attended from November 6, 2006, through April 2007 (Id. ¶4). Plaintiff avers that she also sought chiropractic treatment from Dr. Manoni.

Plaintiff returned for follow-up visits on December 11, 2006, January 3, 2007, and January 29, 2007. Initial EMG studies revealed no signs of radiculopathy or peripheral nerve entrapment, although the EMG and nerve conduction studies done on January 29, 2007, revealed a right L5-S1 radiculopathy.

Plaintiff returned for evaluation on September 15, 2011, after the making of the instant motion. Dr. Butani's impression on that date was that plaintiff "has a 50% restriction on flexion of the lumbosacral spine, extension and side bending are normal" (Id. ¶15). Dr. Butani's findings "indicate the patient has a permanent partial disability to [sic] regard to her lower back and said disability is causally related to the aforementioned motor vehicle accident (Id. ¶16). Dr. Butani opined that "the accident of October 26, 2006 was the direct, competent-producing cause of Mrs. Gonatus Terrano's permanent, chronic and disabling injuries to her lumbar spine, Such injuries have significantly restricted Ms. Gonatus Terrano's ability to perform simple daily tasks and activities and they will continue to pose consequential and significant limitations to her ability to regain the life she had prior to her accident" (Id. ¶17).

Defendants' arguments that plaintiff has failed to provide contemporaneous medical records demonstrating a permanent or significant limitation of use of her lumbar spine are unavailing as the Court of Appeals has recently rejected "a rule that would make contemporaneous quantitative measurements a prerequisite to recovery" (*Perl v. Meher*, _____ NY3d _____ [2011]).

The affirmed MRI reports of plaintiff's lumbar spine of Charles Demarco, M.D. reveals a posterior disc bulge approximating the thecal sac at the L4-L5 level (Ex. C). "[T]o constitute a serious injury, a disc bulge or herniation must be accompanied by objective evidence of the extent of alleged physical limitations resulting from the disc injury (citations omitted)" (*Kearse v. New York City Transit Auth.*, 16 AD3d at 49). Here, Dr. Butani submits that the MRI finding is "totally consistent" with the conclusion of his physical examinations, that is that they are the competent producing cause of plaintiff's lumbosacral spine restrictions.

Counsel for plaintiff submits that the conflicting opinions between defendant's examining physician and plaintiff's doctors raise issues of fact and issues of credibility for a jury to decide. The court agrees. The Court of Appeals recently held that even where plaintiff's evidence is "hardly powerful," issues of credibility are not for the court to decide but for the jury (*Perl v. Meher*, _____ NY3d _____ [2011]).

Accordingly, defendants' motion for summary judgment is denied.

This decision constitutes the order and judgment of the court.

Dated: January 10, 2012

HON THOMAS P. PHELAN

THOMAS P. PHELAN, J.S.C.

ENTERED

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**NASSAU COUNTY
COUNTY CLERK'S OFFICE**

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