

Slotnick v Holmes

2013 NY Slip Op 33761(U)

November 6, 2013

Supreme Court, Westchester County

Docket Number: 60255/11

Judge: Joan B. Lefkowitz

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER - COMPLIANCE PART

-----X

SUSAN SLOTNICK and HOWARD SLOTNICK,

Plaintiffs,

DECISION & ORDER

-against-

Index No. 60255/11
Motion Date: Nov. 4, 2013

WILLIAM HOLMES, HOLMES & HOLMES, LLC,
and HOLMES & KENNEDY, INC.,

Seq. No. 3

Defendants.

-----X
LEFKOWITZ, J.

The following papers were read on motion by defendants for an order compelling plaintiff Susan Slotnick to appear for an independent medical examination so that an orthopedist of defendants' choosing can examine plaintiff's left hip, or alternatively, precluding plaintiff from giving or presenting any evidence regarding her alleged hip injury.

- Order to Show Cause - Affirmation in Support of Gina M. Longobardi, Esq.
- Exhibits A-F
- Affirmation in Opposition of Peter A. Frankel, Esq. - Exhibit A

Upon the foregoing papers and the proceedings held on November 4, 2013, this motion is determined as follows:

Factual and Procedural Background

Plaintiffs commenced this action to recover damages for, inter alia, personal injuries which plaintiff Susan Slotnick allegedly sustained when she tripped and fell in a parking lot on May 27, 2009. Plaintiffs' verified bill of particulars alleges, inter alia, that Susan Slotnick sustained the following injuries: (1) a tear to her right hamstring; (2) a hip labral tear of the left hip, including a partial tear of both the anterolateral gluteus medius tendon and the gluteus minimus tendon; (3) pudendal nerve injury with ligament damage affecting the pelvic floor including sensory branches to the clitoris, vagina and rectal sphincter; (4) scarring of the pelvic floor extending into the pelvic fat and abutting the left pudendal nerve within the canal, causing persistent vaginal pain requiring ongoing treatment including nerve root steroid injections and pelvic floor physical therapy; and (5) cartilage tear of right wrist.

On July 16, 2013, plaintiff Susan Slotnick appeared for an orthopedic examination by defendants' orthopedist, Dr. James R. Dickson. In his report, Dr. Dickson stated that plaintiff Susan Slotnick "refused to allow me to examine her left hip claiming that if I did examine it and put it through range of motion that she would have 3-4 days of pain which she wanted to avoid."

During a compliance conference held on July 18, 2013, plaintiffs' counsel and Howard Slotnick, plaintiff Susan Slotnick's husband, claimed that Dr. Dickson had examined plaintiff Susan Slotnick's left hip. Defendants were then directed to provide plaintiffs' counsel with a copy of Dr. Dickson's report in an effort to get plaintiff Susan Slotnick to voluntarily appear for a further examination of her left hip.

On September 12, 2013, another compliance conference was held. At the conference, plaintiffs' counsel refused to produce plaintiff for a further examination and a briefing schedule for the present motion was issued.

Defendants now seek an order compelling plaintiff Susan Slotnick to appear for a further orthopedic examination of her left hip or for an order precluding plaintiffs from presenting or giving any evidence regarding her alleged left hip injury. Defendants contend that, to date, they have not had the opportunity to examine plaintiff Susan Slotnick's left hip despite the fact that the bill of particulars alleges a left hip injury. Defendants assert that they are entitled to such an examination so that their expert can render an opinion as to his findings, prognosis and/or diagnosis, as well as render an opinion based upon his review of the records and his examination as to whether he believed there is a causal relationship of the claimed hip injury and the subject accident. Defendants argue that, without an examination, Dr. Dickson cannot determine whether plaintiff Susan Slotnick has any current objective medical evidence of a left hip injury or if she has any limitations of her left hip. Finally, defendants contend that plaintiffs have continuously impeded discovery in this action and violated numerous court orders, necessitating multiple conferences and motion practice.

Plaintiffs oppose the motion on the ground that an examination of plaintiff Susan Slotnick's left hip with range of motion testing will aggravate her condition and increase her pain, which her current physician is attempting to manage and control. In opposition, plaintiffs submit the affirmation of Dr. Michael I. Brodman, plaintiff Susan Slotnick's treating physician, who asserts that plaintiff suffers from a pudental nerve injury as the result of the subject accident and continues to experience pain despite physical therapy, steroid injections and the passage of time. Dr. Brodman further states in his affirmation that he "vigorously recommends against" an additional examination of the hip and range of motion testing since such testing is likely to trigger pelvic pain which they are attempting to control. Dr. Brodman specifically asserts that "[t]he obturator internus muscle, which attaches to the greater trochanter of the hip supports a large portion of the nerve in Alcock's canal," and "[a]bnormal or stressful movement of the hip can cause compression and irritation of the nerve." In view of Dr. Brodman's opinion, plaintiffs' counsel contends that plaintiff should not be compelled to submit to a further examination since plaintiff's health may be put at risk or such an examination may aggravate

plaintiff's condition. Plaintiffs' counsel notes that defendants have not submitted any evidence that the further examination would not be harmful to plaintiff. Plaintiffs' counsel further contends that defendants' orthopedist obtained sufficient information during the first examination to diagnose plaintiff with "chronic osteoarthritis of the left hip with no particular exacerbation by this accident."

At oral argument, defendants' counsel declined the court's offer of additional time to submit a reply, including medical proof, to refute plaintiff's medical proof that the testing would aggravate plaintiff's condition and cause her pain.

A defendant is entitled to conduct a physical examination of a plaintiff who puts his or her physical condition at issue in the action (*Ditroia v Buck-Haskin*, 99 AD3d 854 [2d Dept 2012]). Moreover, where a plaintiff's symptoms are serious, complex, and perplexing, the plaintiff may be compelled to undergo additional objective testing procedures as long as the testing is safe, painless and noninvasive (*Bobka v Mann*, 308 AD2d 497 [2d Dept 2003])[motion seeking urodynamic study denied since procedure potentially harmful and invasive]; *Lapera v Shafron*, 159 AD2d 614 [2d Dept 1990] [plaintiff must submit to MRI]). However, once plaintiff establishes that the testing sought by defendants would be "invasive, painful, and harmful to the plaintiff's health," a plaintiff, who has already been examined by defendant's medical expert, should not be compelled to undergo such testing (*Ditroia*, 99 AD3d at 854-855 [urodynamic testing painful, invasive and potentially harmful to plaintiff's health]). Accordingly, a motion to compel plaintiff to submit to certain procedures or testing is properly denied where plaintiff demonstrated that the requested procedure or testing had a risk of infection and aggravation to plaintiff's injury, and defendant failed to refute the evidence that the procedure would be harmful (*see D'Adamo v Saint Dominic's Home*, 87 AD3d 966 [2d Dept 2011] [urethral calibration, an invasive procedure, denied]; *Rosario v BNS Bldgs., LLC*, 67 AD3d 984 [2d Dept 2009] [plaintiff established that proposed medical testing was potentially dangerous]; *Santero v Kotwal*, 4 AD3d 464 [2d Dept 2004] [plaintiff established that urological examination potentially harmful, and was clearly invasive]; *Marino v Pena*, 211 D2d 1995] [urethral calibration had risk of infection and aggravating or increasing plaintiff's condition]). Once a plaintiff demonstrates that certain testing during the examination of plaintiff is potentially dangerous to plaintiff's health, the burden shifts to defendant to show through medical proof that the proposed testing is safe and would not harm plaintiff (*Lefkowitz v Nassau County Med. Ctr.*, 94 AD2d 18, 21-22 [2d Dept 1983]).

In the present case, plaintiff has submitted medical proof in evidentiary form that the examination of plaintiff's left hip by range of motion testing, which is requested on this motion by defendants, would aggravate her existing condition and cause additional pain. Accordingly, the burden shifted to defendants to refute plaintiff's medical proof. Insofar as defendants declined the court's offer of additional time to submit a reply and medical proof refuting plaintiff's medical proof, defendants' motion seeking a further orthopedic examination of plaintiff's left hip for the purpose of performing range of motion testing is denied.

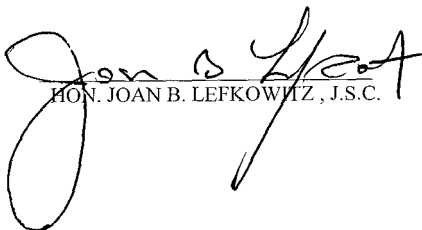
In view of the foregoing, it is

ORDERED that defendants' motion seeking an order compelling plaintiff Susan Slotnick to appear for a further orthopedic examination of her left hip and undergo range of motion testing is denied; and it is further

ORDERED that insofar as all discovery has now been completed, a trial readiness order shall be issued.

The foregoing constitutes the decision and order of this court.

Dated: White Plains, New York
November 6, 2013



HON. JOAN B. LEFKOWITZ, J.S.C.

TO:

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cc: Compliance Part Clerk