

Fernandez v Pena

2021 NY Slip Op 33735(U)

June 15, 2021

Supreme Court, Suffolk County

Docket Number: Index No. 601944/2020

Judge: Joseph A. Santorelli

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SHORT FORM ORDER ORIGINAL

INDEX No. 601944/2020
CAL No.

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 3-10-2021
SUBMIT DATE 5-6-2021
Mot. Seq. # 02- MD

YADIS GLORIBEL FERNANDEZ,
Plaintiff,
-against-
ANTONIO PENA,
Defendant.

CANNON & ACOSTA, LLP
Attorneys for Plaintiff
1923 NEW YORK AVE
HUNTINGTON STATION, NY 11746
DESENA & SWEENEY, LLP
Attorneys for Defendant
1500 LAKELAND AVE
BOHEMIA, NY 11716

Upon the following papers numbered 1 to 27 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 11; Notice of Cross Motion and supporting papers; Answering Affidavits and supporting papers 12 - 20; Replying Affidavits and supporting papers 21 - 27; Other; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED, that the motion is determined as follows:

This motion by the defendant for an order granting summary judgment dismissing the complaint on the ground that the plaintiff did not sustain a "serious injury" within the meaning of N.Y. Insurance Law § 5102(d) is denied.

The plaintiff commenced this action to recover damages for personal injuries allegedly sustained as the result of a motor vehicle accident which occurred on May 23, 2019. The plaintiff alleges that she was operating a motor vehicle on Heyward Street at or near its intersection with Jefferson Avenue, Town of Islip, Suffolk County, New York, when defendant, Antonio Pena, was operating a motor vehicle and struck the plaintiff's vehicle. The plaintiff was taken by ambulance to Southside Hospital complaining of neck, lower back and abdominal pain. It should be noted that the plaintiff was pregnant at the time of the accident and delivered her child in November 2019. It is alleged in the bill of particulars that the plaintiff sustained injuries to

L4-5 disc bulge with thecal sac indentation; L5-S1 disc bulge with thecal sac indentation; C3-4 disc bulge with thecal sac impingement; C4-5 disc bulge; C5-6 disc bulge with encroachment upon ventral margin cord; C6-7 disc herniation with thecal sac impingement; Left shoulder sprain.

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In order to effectuate the purpose of no-fault legislation to reduce litigation, a court is required to decide, in the first instance, whether a plaintiff has made out a *prima facie* case of "serious injury" sufficient to satisfy the statutory requirements (*Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570, 441 NE2d 1088 [1982]; *Brown v Stark*, 205 AD2d 725, 613 NYS2d 705 [2d Dept 1994]). If it is found that the injury sustained does not fit within the definition of "serious injury" under Insurance Law § 5102(d), the plaintiff has no judicial remedy and the action must be dismissed (*Licari v Elliott*, *supra*, at 57 NY2d 238; *Velez v Cohan*, 203 AD2d 156, 610 NYS2d 257 [1st Dept 1994]). 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 defendant submitted an affirmed medical report prepared by Dr. Craig B. Ordway. At defendant's request, Dr. Ordway, an orthopedic surgeon, conducted an independent examination of the plaintiff on January 14, 2021. Dr. Ordway's report states that range of motion testing revealed normal joint function in the cervical and lumbrosacral regions, and that there was "no finding of spasm in the paravertebral musculature, the trapezii, or anterior strap muscles as these ranges are measured". He further states that the plaintiff "presents with a normal straight leg raising test by indirect observation". The range of motion testing of the left shoulder revealed

a limitation of forward flexion to 160° (180°). Abduction is limited by subjective complaints of discomfort to 150° (180°). At neutral, internal rotation is limited to 70° (80°). The claimant demonstrates a negative "drop test," indicating competency of the rotator cuff. There is no instability of the left shoulder. The apprehension test is negative. There is no crepitus within the shoulder joint. The claimant states that she has mild tenderness over the left acromioclavicular joint. There is no prominence noted.

Dr. Ordway concludes that

At this time, the examination of the cervical and lumbar levels of the spine, as well as the orthopedic/neurologic examination of the upper extremities, is entirely within normal limits for a claimant of the same age and body habitus. There is no evidence of any impairment of function secondary to a spinal injury resulting from the 05/23/19 incident.

Examination of the left shoulder reveals a minor decrease in range of motion secondary to the claimant's subjective complaints of discomfort with range

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of motion testing. The objective examination of the left shoulder is entirely within normal limits.

Based on the foregoing, it is the conclusion of the Court that the defendant met his initial burden of establishing, as a matter of law, that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) (*see McKinney v Lane*, 288 AD2d 274, 733 NYS2d 456 [2d Dept 2001], citing *Gaddy v Eyster*, 79 NY2d 955, 591 NE2d 1176, 582 NYS2d 990; *Licari v Elliott*, 57 NY2d 230, 441 NE2d 1088, 455 NYS2d 570).

In opposition to the defendant's application, plaintiff submitted an affidavit of Nicholas Martin, D.C., her treating chiropractor, who noted that the plaintiff received treatment in his office from May 29, 2019 to November 2019, when she delivered her child, and then was re-examined on December 16, 2019 and continued to receive treatment until "May of 2020 when her no-fault insurance benefits were cut-off". Orthopedic and neurological testing was performed during the initial examination on May 29, 2019 and it as noted that

Of note she was positive for Heel Walk test and Toe Walk Test were positive. This test is performed by asking the patient to walk on her heels and toes an extremely difficult maneuver if the patient is experiencing lumbar nerve root impingement. In addition, the patient was positive with the Kemp's test bilaterally. This test is performed by stabilizing the pelvis with one hand while exerting extension, rotation and lateral bending to the trunk and lumbar spine. Finally, Lasegue Test were positive bilaterally and Maximum Cervical Compression was positive.

I also performed range of motion testing on Ms. Fernandez at that time. Range of motion was measured using a goniometer. In her lumbar spine she was restricted at flexion to 74 degrees when normal is 90 degrees. At extension she was restricted at 26 degrees when normal is 30 degrees. It should be noted that the patient was pregnant at the time of the accident and therefore care was limited.

Nicholas Martin, D.C., further states that on December 16, 2019 he re-examined the plaintiff, as she was one month post delivery, and found

At that time range of motion was measured using a goniometer. She remained restricted in cervical flexion 53 degrees when normal is 60 degrees, extension was 46 degrees when normal is 50 degrees, left rotation was 69 degrees when normal is 80 degrees, right rotation is 73 degrees when normal is 80 degrees. In her lumbar spine she was restricted in flexion at 74 degrees when 90 degrees is normal, extension was 26 degrees when normal is 30 degrees, left and right rotation were 26 degrees when normal is 30

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degrees. Because of continuing symptomology, she was sent for MRI testing and resumed treatment. Of note the MRI report dated January 2, 2020, revealed disc bulges at C3/4, C4/5, C5/6 and disc herniation at C6/7. In the lumbar spine MRI taken January 2, 2020, disc bulge was noted at L4/5 and L5/S1. I referred her to an orthopedist, for left shoulder complaints. She treated at Orthomed Health with Dr. Syeda Shazia Asad. Dr. Asad's affirmed medical reports are annexed to this affirmation. Dr. Asad diagnosed Ms. Fernandez with left shoulder sprain and prescribed a course of physical therapy for a period of approximately four months.

Nicholas Martin, D.C., further states that on March 25, 2021 he re-examined the plaintiff and found

At the time of the recent examination she complained of chronic and persistent lower back as well as intermittent neck pain and intermittent headaches. Of note, she still remained positive with the Kemp's Test bilaterally, and the Lasague's Test bilaterally. Heel Walk test and Toe Walk test were also positive again. Range of motion was again measured using a goniometer. During lumbar range of motion she was restricted at flexion to 70 degrees when normal is 90 degrees. At extension she was restricted at 18 degrees when normal is 30 degrees. Left rotation was measured to be 26 degrees with 30 being normal. Right rotation was measured at 24 degrees with 30 being normal. Left lateral flexion was 16 degrees with 20 being normal. Finally right lateral flexion was 20 degrees with 20 being normal. During cervical range of motion, she was restricted at flexion to 48 degrees when normal is 60 degrees. At extension she was restricted at 40 degrees when normal is 50 degrees. At left rotation she was restricted to 63 degrees when normal is 80 degrees. Left lateral rotation was 31 degrees when normal is 40 degrees, right lateral rotation was 35 degrees with normal being 40 degrees.

Nicholas Martin, D.C., opines that "My diagnosis is that Yadis Gloribel Fernandez has sustained lumbar derangement confirmed by MRI, as well as cervical sprain... I believe her injuries are all the direct result of trauma she received to her body in the motor vehicle accident of May 23, 2019. As it is now nearly 2 years since the motor vehicle accident, and she still remains symptomatic, I believe her injuries are permanent in nature. I believe she has sustained a significant limitation in her lumbar and cervical spine for which she can expect to experience future cervical and lumbar pain."

"Where the treating physician, in an affidavit supported by exhibits, has set forth the injuries and course of treatment, identified a limitation of movement of the neck of only 10 degrees to the right or left, and on that predicate expressed the opinion that there was a significant limitation of use of a described body function or system, such evidence was sufficient for the denial of summary judgment

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to defendants” (see *Lopez v Senatore*, 65 NY2d 1017, 484 NE2d 130). Such evidence, coupled with the plaintiff’s examination before trial testimony as to continued pain and physical limitations, is sufficient to raise a triable issue of fact and therefore the motion in denied. (see *Mela v Gentile*, 306 AD2d 388, 761 NYS2d 482[2d Dept 2003]; see also *Singh v Varano*, 306 AD2d 340, 760 NYS2d 545 [2d Dept 2003]).

The foregoing constitutes the decision and Order of this Court.

Dated: June 15, 2021



HON. JOSEPH A. SANTORELLI
J.S.C.

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION