

Avallone v Burke

2010 NY Slip Op 31611(U)

June 23, 2010

Supreme Court, Suffolk County

Docket Number: 07-25751

Judge: Joseph Farneti

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 12-14-09
ADJ. DATE 3-11-10
Mot. Seq. # 001 - MD

-----X
KARIN AVALLONE, :
 :
 Plaintiff, :
 :
 - against - :
 :
 JAMES BURKE, SUFFOLK COUNTY DISTRICT :
 ATTORNEYS OFFICE, and COUNTY OF :
 SUFFOLK :
 Defendants. :
-----X

MICHAEL S. LANGELLA, P.C.
Attorney for Plaintiff
2459 Ocean Avenue
Ronkonkoma, New York 11779

CHRISTINE MALAFI, ESQ., Suffolk Cty Attorney
By: Diana T. Bishop, Esq.
Attorneys for Defendants
100 Veterans Memorial Highway, P.O. Box 6100
Hauppauge, New York 11788-0099

Upon the following papers numbered 1 to 29 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 24; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 25 - 29; Replying Affidavits and supporting papers ; Other memorandum of law by defendants; it is,

ORDERED that the motion by defendants James Burke, the Suffolk County District Attorneys Office and the County of Suffolk is denied.

Defendants James Burke, the Suffolk County District Attorneys Office and the County of Suffolk (“Burke,” the “District Attorneys Office,” “Suffolk” and, collectively, “defendants”) move to dismiss a complaint by plaintiff Karin Avallone (“plaintiff”) and provide a copy of a notice of claim, copies of the pleadings, various pretrial deposition transcripts and various medical reports. Plaintiff has submitted an affirmation in opposition and provides an affirmation by Stephen Hershowitz M.D. (“Hershowitz”), an affirmation by John Himelfarb, M.D. (“Himelfarb”), an affirmation by Gary DiCanio D.O. (“DiCanio”), various medical reports, and an affirmation by plaintiff. Defendants have submitted an amended notice of motion and a memorandum of law.

By their motion, defendants seek dismissal of plaintiff’s underlying complaint which alleges serious personal physical injuries as defined by New York State Insurance Law § 5102 (a) as a result of a motor vehicle accident that occurred on June 2, 2006, at the intersection of Gibbs Pond Road and Steuben Boulevard in Smithtown, New York. According to plaintiff’s testimony, she was stopped at a stop sign at the intersection of Gibbs Pond Road and Steuben Boulevard for “about two seconds” during which time she “looked [left to right] to see if there were any other cars.” Plaintiff was traveling westbound. A car to

her right waved her to proceed. After checking again to ensure no other vehicles were approaching, she saw “[t]he truck that hit me.” Plaintiff estimated the speed of the truck at approximately 30 miles per hour. The truck “pushed me into the other car, spun me around.” At the time of impact, plaintiff testified she “was proceeding from the stop sign” and was traveling very slowly making a left turn to go south on Gibbs Pond Road. Plaintiff testified that after the accident her mother drove her to work and later drove her home. Plaintiff testified that after arriving home, she started getting “stiff” and began taking Motrin. She testified she was driven to St. Catherine of Sienna Hospital emergency room the following morning where she was given a shot to relax her muscles. Plaintiff testified approximately ten days later she sought treatment at J.R. Medical & Pain Management where she was evaluated and x-rays were taken. She was prescribed physical therapy and chiropractic treatment. Plaintiff testified she commenced treatment three times a week and is “still going.” The treatment, according to plaintiff, includes electrical stimulation, acupuncture, massage, stretching, neck and shoulder exercises and chiropractic adjustments. Plaintiff testified that she has had three MRIs and a CAT scan for headaches. Plaintiff also sought treatment from a neurologist for the headaches. She was given a prescription for Flexeril and Motrin 600. Other treatments included ice packs and Epsom salt baths. Plaintiff also testified that she was seen by an orthopedic surgeon twice.

According to Burke’s pretrial testimony, on the date of the accident he was traveling northbound on Gibbs Pond Road and, as he approached the stop sign, he applied his brakes but his vehicle skidded and he was unable to stop. Ultimately, Burke’s vehicle collided with plaintiff’s car.

Defendants note that plaintiff was seen on several occasions for independent medical examinations. On August 14, 2006, she was seen by Dr. Alan Zimmerman (“Zimmerman”), an orthopedist. According to his report, “examination of [plaintiff’s] left shoulder revealed no muscle atrophy or asymmetry. Impingement sign was negative. Forward flexion of the left shoulder was 160 (180 normal), abduction was 135 degrees (180 normal), adduction was 45 degrees (45 normal), internal rotation was 50 degrees (70 normal), and external rotation was 70 degrees (90 normal). There was tenderness over the rotator cuff, biceps, and AC joint. Apprehension sign was negative.” As noted by defendants, Zimmerman found plaintiff’s range of motion with respect to the cervical and lumbar spine to be within the normal range and that her cervical and lumbar sprains were resolved. It is also noted that the range of motion in the left shoulder was “resolving.”

Plaintiff underwent chiropractic examination conducted by Dr. Christopher Ferrante (“Ferrante”) on August 28, 2006. According to his findings, plaintiff presented with “resolving sprain/strain of the cervical spine. Resolving sprain/sprain of the thoracic spine. Resolving sprain/strain of the lumbar spine.” Ferrante also concluded “[a]fter reviewing the available medical records, taking a complete history and performing a complete physical examination, it is apparent that the injuries sustained in the June 2, 2006 accident are causally related.”

Plaintiff also underwent an independent medical examination performed by another orthopedist, Dr. William Walsh (“Walsh”). Walsh, who examined plaintiff on November 21, 2006, found no tenderness to the palpation of the paracervical muscles, and no muscle spasm of the paracervical muscles or of the trapezii. According to Walsh’s report, plaintiff exhibited limited range of motion in her cervical spine, with flexion to 35 degrees (45 normal), extension to 30 degrees (45 normal), right rotation to 50 degrees (60 normal), left rotation to 50 degrees (60 normal), right lateral rotation to 40 degrees (45

normal), and left lateral rotation to 40 degrees (45 normal). Walsh also noted, as to the lumbar spine: "There are no spasms or tenderness noted over the paralumbar muscles on palpation. Range of motion of the lumbar spine reveals forward flexion to 70 degrees (85 normal), extension to 20 degrees (25 normal), right lateral bending to 30 degrees (35 normal), right rotation to 40 degrees (45 normal), and left rotation to 40 degrees (45 normal)." As to plaintiff's left shoulder, Walsh found "[t]here was no tenderness to palpation. There is no crepitus noted. Impingement sign is negative. Range of motion of the shoulder reveals forward abduction to 110 degrees, adduction to 50 degrees, forward flexion to 170 degrees, extension to 40 degrees, internal rotation was normal, and external rotation to 80 degrees." Walsh concluded "[b]ased upon the history provided and findings on examination, there is a probable causal relationship between the accident of record and the claimant's reported symptomatology."

Plaintiff underwent an independent medical examination performed by Dr. Lillian Bobelian ("Bobelian"), a chiropractor, on November 21, 2006, who found "[r]ange of motion of the lumbar spine is flexion to 75 degrees (90 normal), extension to 30 degrees (30 normal), and lateral bending to 35 degrees bilaterally (35 normal)." Bobelian also found the injuries sustained to be causally related to the accident.

Plaintiff also underwent an independent medical examination performed by Dr. Stanley Ross, an orthopedic surgeon, on February 8, 2007, who found her range of motion, in all respects, within the normal range.

Finally, plaintiff underwent an independent medical examination performed on behalf of Suffolk by Dr. Arthur Bernhang ("Bernhang"), an orthopedic surgeon, on September 24, 2008. Based upon "observed and measured by goniometer/tape measure and recorded in L/R order" cervical extension 35, average range of joint motion 55; cervical flexion 25, average range of joint motion 55; lateral flexion 35/25, average range of joint motion 80; active shoulder abduction 85/85, average range of joint motion 180; active shoulder forward flexion 85/85, average range of joint motion 180; shoulder external rotation 95/95, average range of joint motion 90; and shoulder internal rotation 90/90 (D10/D10), average range of joint motion 90." Bernhang also found "[c]ervical compression (Spurling's test) causes reported back pain - this is inconsistent as vertex compression should not cause lower back pain. The reflexes at the elbow are symmetrical. She reports no tenderness or palpation of the right and left trapezius muscle but there is no palpable fibromyalgia, trigger points or spasm noted. When asked to move back on the examining table, she does a press up - when you have a bad shoulder this is not performed without pain." Bernhang also reported that a majority of individuals in plaintiff's age group suffer from bulging discs and the condition is not necessarily related to trauma. He also found, as to the findings of an MRI of plaintiff's left shoulder, that "these findings are chronic and longstanding and must have pre-existed the accident of the prior month as there is no fluid noted." Bernhang's report concludes by finding no orthopedic disability which is causally related to the accident.

At the behest of Suffolk, plaintiff also underwent a neurological examination by Dr. Howard B. Reiser ("Reiser") on October 8, 2008, who found "[p]laintiff presents with ongoing subjective symptoms including pain in her low back, mid back and left shoulder. She reports that the symptoms are nonfocal, and intermittent, and she also reports some mild intermittent headaches. Today's neurological examination reveals no objective finding. The record review does not reveal any causally related abnormality on imaging studies. Both CT and MRI of the brain revealed no reported herniations or neural compressions. There is a single report of electrodiagnostic studies performed by a chiropractor. This

study is said to reveal abnormalities involving cervical nerve roots and peripheral nerves. However, the report appears to be inconsistent, and does not correlate with any symptom or clinical finding. Furthermore, the chiropractic interpreter indicated that the findings were not pathognomonic of any specific disorder. (This report does not appear to be of any neurological consequence.)”

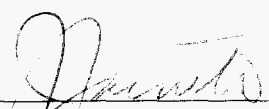
Defendants note that plaintiff continues to work full time and that she participates in various physical activities albeit to a more limited extent than prior to the accident. Based upon the various medical findings, defendants argue plaintiff did not sustain a serious physical injury causally related to the motor vehicle accident on June 2, 2006.

By her affidavit in opposition, plaintiff contends, as a threshold matter, that defendants’ own submissions demonstrate a failure to establish *prima facie* entitlement to dismissal. Specifically it is noted that defendants’ examining orthopedist found that plaintiff continues to experience significant restricted limitations in her range of motion. Plaintiff also points to a supporting narrative report by Gary DiCanio, DO (“DiCanio”) who found, based upon her medical records, that plaintiff sustained injury to her cervical spine, lumbar spine, and left shoulder including cervical disc bulge with thecal sac impingement and radiculopathy, lumbar disc bulge with thecal sac impingement and radiculopathy, and left shoulder partial supraspinatus tear as a result of the motor vehicle accident on June 2, 2006. DiCanio concluded that plaintiff’s injuries are permanent. Plaintiff also notes that the medical records submitted in support of defendants’ motion are incomplete inasmuch as the submissions detail treatment through the Fall of 2007 despite continuation of treatment for two additional years and “well beyond the termination of her no fault benefits.” Plaintiff also points to the affirmation by Hershowitz who, upon review of an MRI taken of her cervical spine, found a “C5/6 Disc bulge which impinges upon the thecal sac. Straightening of the cervical spine, probably secondary to muscular spasm and/or sprain.” A report of Hershowitz’s findings as to an MRI taken of plaintiff’s lumbar spine on July 10, 2006 found an “L4/5 disc bulge, which impinges upon the thecal sac.” A report by Himelfarb of a July 20, 2006 MRI of plaintiff’s left shoulder found “[s]traight acromion process causing a mild degree of subacromial impingement upon the musculotendinous junction of the supraspinatus. Signal abnormality with the distal supraspinatus tendon consistent with a partial tear and/or tendinitis, without retraction.” Plaintiff also submitted electrodiagnostic studies indicating “evidence of a left C5/6, C6/7 radiculopathies, mild bilateral median sensory nerve entrapment at the wrist and right radial sensory neuropathy at this time” and “evidence of chronic bilateral L4-5 and L5-S1 radiculopathies, right worse than the left at this time.” Plaintiff’s counsel notes that Bernhang’s findings as to the left shoulder MRI are suspect inasmuch as he is not a radiologist and are, in any event, unsupported. Counsel also discounts Reiser’s findings as untrue and contradicted by the MRI report. Plaintiff has also submitted an affirmation detailing the medical difficulties she has experienced since the accident and the “excellent health” she enjoyed prior to the event.

On a motion for summary judgment where defendant movant has established *prima facie* entitlement to a summary determination that plaintiff has not sustained a serious physical injury as required by Insurance Law § 5102 (d), the burden then shifts to plaintiff to demonstrate that she has sustained such injury or that questions of fact exist as to whether the injury sustained was serious (*see Martin v Schwartz*, 308 AD2d 318 [2003]). However, if defendant does not establish a *prima facie* case that plaintiff’s injuries do not meet the serious injury threshold, the court need not consider the sufficiency of plaintiff’s opposition papers (*see Burns v Stranger*, 31 AD3d 360 [2006]).

Here plaintiff opposes defendants' motion both on the ground that the initial burden has not been met and because objective evidence has been provided to show that she did sustain a serious physical injury as a result of the accident. The proof submitted by defendants failed to establish that plaintiff did not establish a serious physical injury (see *Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]). Defendants own examining orthopedists and neurologists found limitations in plaintiff's various ranges of motion and, except for Bernhang's report, causally connected the injuries to the accident. The cases cited by defendants on the issue in large measure address those instances in which defendants established *prima facie* entitlement to a summary determination in the first instance. Further, the limitations on plaintiff's range of motion as evidenced by the report of the defendants' examining orthopedists, were significant as to plaintiff's cervical spine and left shoulder more than two years after the accident (see *Joissaint v Starrett-1 Inc.*, 46 AD3d 622 [2007]). As defendants failed to meet their initial burden, it is unnecessary to consider whether plaintiff's papers submitted in opposition were sufficient to raise a triable issue of fact (see *Corscia v 938 Trading Corp.*, 283 AD2d 538 [2001]).

Dated: 6/23/10



Hon. Joseph Farneti
Acting Justice Supreme Court

____ FINAL DISPOSITION X NON-FINAL DISPOSITION