SCAD

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON

Justice

SANDYE E. PINZ,

Plaintiff(s),

- against -

ANTHONY J. MEROLA,

Defendant(s).

TRIAL/IAS PART 5

INDEX NO. 4472/10

MOTION SEQUENCE NO. 2

MOTION SUBMISSION DATE: March 2, 2012

The following papers read on this motion:

Notice of Motion	X
Affirmation in Opposition	X

Upon the foregoing papers, the motion by the defendant for an Order pursuant to CPLR §3212 dismissing the Complaint of the plaintiff, Sandye E. Pinz, with prejudice, on the ground that the plaintiff has not sustained a "serious injury" as defined by Insurance Law §5102(d), and granting summary judgment in favor of the defendant, is determined as hereinafter provided:

This personal injury action arises out of a rear-end motor vehicle accident that occurred on August 26, 2009 at approximately 11:10 am on West Beech Street at or near its intersection with Pennsylvania Avenue, Nassau County, NY.

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

> "Plaintiff, SANDYE E. PINZ sustained the following permanent injuries as a result of the accident:
>
> - SPRAIN AND STRAIN OF THE CERVICAL SPINE WITH LIMITATION OF MOTION, PAIN AND SPASM;
> - SPRAIN AND STRAIN OF THE LUMBAR SPINE WITH LIMITATION OF MOTION, PAIN AND SPASM;
> - SPRAIN AND STRAIN OF THE THORACIC SPINE WITH LIMITATION OF MOTION, PAIN AND SPASM;
> - LEFT THORACIC RADICULOPATHY REQUIRING INTRALAMINAR

THORACIC EPIDURAL STEROID INJECTIONS PERFORMED WITH FLUOROSCOPIC GUIDANCE AND INTRAVENOUS SEDATION;
- STRAIGHTENING OF THE THORACIC CURVATURE WITH POSTERIOR MIDLINE TO LEFT DISC HERNIATIONS AT BOTH T7-T8 AND T10-T11;
- STRAIGHTENING OF THE CERVICAL CURVATURE STATUS POST FUSION OF C6-C7 WITH BULGES INTO THE PRE-VERTABLE SOFT TISSUE AT C4-C5, C5-C6 AND A POSTERIOR BULGE AT C5-C6;
- L1-L2 POSTERIOR BULGE;
- L2-L4 POSTERIOR BULGE;
- L4-L5 POSTERIOR BULGE;
- EXACERBATION, AGGRAVATION ACTIVATION OF PREVIOUSLY QUIESCENT DEGENERATIVE DISC DISEASE;
- LEFT CERVICAL RADICULOPATHY;
- LEFT LUMBAR RADICULOPATHY;"

The plaintiff's Supplemental Verified Bill of Particulars states:

"Plaintiff, SANDYE E. PINZ sustained the following additional permanent injuries as a result of the accident:

- THORACIC HERNIATED DISCS AT T7-T8 AND T10-T11 WITH NEED FOR FUTURE LASER DISC SURGERY;"

The defendant in support of the instant application, amongst other things, submits the February 9, 2011 deposition transcript of the plaintiff; an affirmed letter report dated May 23, 2011 of Jonathan D. Glasman, MD, an orthopedist of an orthopedic examination conducted on May 23, 2011; and an affirmed letter report dated May 12, 2011 of Naunikal Sachder Singh, MD, a neurologist of a neurological examination of the plaintiff conducted on May 12, 2011.

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, ember, 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."

In pertinent part, the report of Dr. Glassman sets forth:

> "Physical Examination:
>
> For identification purposed only, Ms. Pinz presents as a 63-year-old right-handed female. She is 5 feet 5 inches tall and weighs 120 pounds. She has brown hair and hazel eyes.
>
> On physical examination today, I found Ms. Pinz to be alert, cooperative and well oriented to person, place and time. Her communication skills, recent and remote memory, insight and judgment affect and mood are all within normal limits. She is able to follow commands and cooperate with the examination. My findings are as follows:
>
> Range of motion determination was performed by both my expert clinical eye and judgment as a board certified orthopedic surgeon of such exams as well as the use of orthopedic goniometers. Any range of motion finding less than normal and/or asymmetrical with the contra lateral side is confirmed with goniometry.
>
> Cervical Spine:
>
> Examination of the cervical spine reveals a normal lordosis. Cervical compression testing is negative. Spurling's test is negative. The cervical

paraspinal region was palpated using light touch and no paraspinal or trapezius muscle spasm is noted. There is stated tenderness over the left cervical spine paraspinal region and over the left trapezial region. Voluntary range of motion of the cervical spine with flexion to 40 degrees (45 degrees normal), extension to 35 degrees (45 degrees normal), right rotation to 50 degrees (70-90 degrees normal), right lateral flexion to 40 degrees (45 degrees normal) and left lateral flexion to 30 degrees (45 degrees normal).

Neurological examination reveals muscle strength graded at 5/5 in the biceps, triceps, wrist flexor and extensor bilaterally (5/5 normal). Deep tendon brachioradiallis, biceps and triceps reflexes are present and active bilaterally at 2+ (2+ normal). Grasping power is firm in both hands. There is no radiation of pain or paresthesia. Tinel's test is negative but stated to be provocative for isolated wrist pain and delayed radiation of pain from shoulder to left 5th finger.

Thoracic Spine:

The shoulder blades are symmetrical and no discomfort is noted. There is stated tenderness along the medial border down to the interior angle on the left side only. There is no tenderness over the spinous process from T1 through T12. The thoracic curvature is normal with no paraspinal spasm. There is no sensory loss.

Lumbar Spine:

The lordotic curve is normal. There are no spasms noted over the paraspinal musculature on palpation. Sitting Lasegue's testing is negative to 90 degrees. Straight leg raising is negative to 90 degrees in both the seated and supine positions. Patrick's testing is negative for the lumbar spine and/or radiation of pain but is stated to be provocative for isolated knee medial joint line discomfort bilaterally though there are no claimed knee issues in this case. Voluntary range of motion of the lumbar spine reveals forward flexion to 90 degrees (90 degrees normal), extension to 20 degrees (30 degrees normal), and right lateral flexion to 25 degrees (45 degrees normal) and left lateral flexion to 25 degrees (45 degrees normal). Right lateral rotation is to 20 degrees (40 degrees normal) and left lateral rotation is to 20 degrees (40 degrees normal).

Neurological examination reveals a normal gait. Toe-heel walk is normal but with stated discomfort of left foot bunion. Patellar, Medial Hamstring and Achilles deep tendon reflexes to be 2+ (2+ normal). There is no sensory deficit. Voluntary muscle strength of the lower extremities is graded 5/5 (5/5 normal). There is no radiation of pain, numbness or tingling. Calf circumference measures 35.5 cm on the right versus 36.5cm on the left, when measured 25cm proximal to the medial malleolus.

. . .

IMPRESSION:

Based on the history obtained, the physical examination performed and the available medical records for my review, it is my opinion that Ms. Pinz is status post thoracic spine epidural steroid injections with fluoroscopic guidance and intravenous sedation. She previously underwent surgery of the cervical spine, anterior cervical discectomy and fusion at C6-7 level in 1987. Ms. Pinz has pre-existing cervical spine degenerative disc disease and degenerative joint disease, multi-level, as per diagnostic imaging studies, pre-existing thoracic spine degenerative disc disease, degenerative joint disease and disc dessication, as per diagnostic imaging studies, and pre-existing lumbar spine degenerative disc disease and degenerative joint disease, as per diagnostic imaging studies.

Given that the injuries alleged in the bill of particulars are predominately quotations from or reiterations of reported MRI reading findings, I would strongly recommend that all diagnostic imaging studies following the 08/26/09 date of injury as well as prior to and subsequent to her anterior cervical discectomy and fusion at C6-7 level in 1987 be reviewed by an independent radiologist so as to verify the reported readings, and, if verified to comment on the most likely etiology of these findings being the dequelae of a single traumatic event from 08/26/09 or rather being the continuum of a pre-existing chronic degenerative process. Additionally, any interval change between imaging studies done prior to 8/26/09 and after 8/26/09 should be noted as well as the most likely etiology of any such changes.

Based upon the history obtained, the physical examination performed and the available medical records for my review, there is no indication for any further causally related treatment from an orthopedic viewpoint. There is no need for further physical therapy.

In my opinion, based on the history obtained, the physical examination performed and the available medical records for my review, I find the examinee has no causally related disability. There is no objective evidence of a causally related need to limit work status and/or activities of daily living, though the voluntarily demonstrated range of motion limitations as well as the stated subjective complaints - causal relation not established are likely to cause limitations in one being a yoga instructor."

The report of Dr. Singh provides:

"EXAMINATION

Ms. Pinz is 5 feet 4 inches in height and weight is 120 lbs.

All palpation was carried out by using light finger pressure. Ms. Pinz was instructed to respond immediately if she felt pain under the examiner's finger by saying 'pain' and to keep repeating this word as many times as pain was experienced. When performing range of motion, Ms. Pinz was advised to do the best she was capable of and a goniometer was used.

The normal range of motion was based on published guidelines by the NYS

Division of Disability Determination and the American medical Association.

HEAD:

Head was normocephalic. There was no tenderness or deformity.

CERVICAL SPINE:

Ms. Pinz was not using a cervical collar. Palapation of the cervicalspine revealed no vertebral tenderness. There was no paravertebral muscle tenderness or spasm over the right or left side. There was no tenderness over the right or left trapezius muscles. Foraminal compression and Valsalva maneuver were negative.

The range of neck movements using the goniometer showed flexion at 45 degrees (45 degrees normal), extension was 0 (45 degrees normal), right and left lateral flexion was 30 degrees (45 degrees normal) and right and left lateral rotation was 60 degrees (80 degrees normal).

THORACICC SPINE:

There was no tenderness over the thoracic spine or thoracic paraspinal muscles. There was no spasm of the thoracic paraspinal muscles.

LUMBAR SPINE:

Ms. Pinz was not using a lumbosacral support. Palpation of the lumbar spine revealed no vertebral tenderness. There was no paraspinal muscle tenderness or spasm on the right and left side. There was no tenderness over the sciatic notch. Valsalva maneuver was negative.

The range of motion of the lumbar spine using the goniometer showed flexion at 90 degrees (90 degrees normal), extension was 20 degrees (25 degrees normal), right and left lateral flexion was 20 degrees (25 degrees normal) and right and left lateral rotation was 20 degrees (30 degrees normal).

Supine straight leg raising test was at 90 degrees on both sides (90 degrees normal).

Sitting straight let-raising test was at 90 degrees on both sides (90 degrees normal).

SHOULDER JOINTS:

There was no tenderness over the right shoulder joint. Flexion was 120 degrees (180 degrees normal), extension was 40 degrees (50 degrees normal), abduction was 140 degrees (180 degrees normal), abduction was 30 degrees (30 degrees normal), internal rotation was 40 degrees (40 degrees normal) and external rotation was 90 degrees (90 degrees normal).

There was no tenderness over the left shoulder joint. Flexion was 120 degrees (180 degrees normal), extension was 40 degrees (50 degrees normal), abduction was 120 degrees (180 degrees normal), abduction was 30 degrees (30 degrees normal), internal rotation was 40 degrees (40 degrees normal) and external rotation was 90 degrees (90 degrees normal).

MOTOR EXAMINATION:

There was no atrophy or fasciculations. Muscle tone was normal in all four extremities.

FUNCTIONAL MUSCLE TESTING:

Functional muscle testing revealed muscle strength to be 5/5 in all four extremities.

SENSORY EXAMINATION:

Sensations to light touch, pain, vibration and position sense was normal in all four extremities. Tinel's Sign and Phalen's Sign were negative bilaterally.

REFLEXES:

Deep tendon reflexes were symmetrical and 2+ in all four extremities. Plantar responses were flexor bilaterally.

COORDINATION:

Finger-to-nose and heel-to-shin tests were normal bilaterally.

GAIT AND STATION:

Ms. Pinz had a normal gait. She required no assistance in getting on and off the examination table. She was not using a cane, walker or crutches to ambulate. She was able to walk tandem and on her toes and heels without any difficulty. Romberg's Test was negative.

CRANIAL NERVES:

Visual fields were full to confrontation. Extraocular movements were full. There was no nystagmus or diplopia. Pupils were equal and reactive to light and accommodation. Corneal reflexes were present bilaterally. There was no facial asymmetry. Hearing was normal. Air conduction was better than bone conduction. There was no localization on Weber's Test. Tongue was midline and palate moved symmetrically.

HIGHER MENTAL FUNCTION:

Ms. Pinz was alert and oriented to date, place and time. She had normal speech. There was no dysarthria or aphasia. She was able to follow

commands, namely body parts and common objects. There was no agnosia or apraxia. Oral calculations were normal. Her mood and affect were normal. She denied any visual or auditory hallucinations.

IMPRESSION AND DIAGNOSIS:

- Cervical, thoracic and lumbar spine sprain/strain - resolved - the restricted range of motion of the cervical and lumbar spine is on a voluntary basis and is due to poor effort.
- Osteoarthritis and degenerative disc disease of the spine - unrelated.

CAUSAL RELATIONSHIP:

Taking into consideration the history, a review of the medical records and the physical examination, it is my opinion that the cervical, thoracic and lumbar spine sprain is causally related to the motor vehicle accident on 08/26/09.

DISABILITY:

There is no neurological disability based on my examination today and Ms. Pinz is not disabled from working or from activities of daily living."

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 pertinent part, the plaintiff in opposition to the defendant's requested relief submit an affidavit from the plaintiff's treating chiropractor Timothy M. Haas, DC who treated the plaintiff on the day of the alleged accident; an affirmation of John T. Rigney, MD, a radiologist who performed 3 MRIs of the plaintiff; the lumbar spine; cervical spine and thoracic spine; and an affirmed letter report of Donald I. Goldman, MD, an orthopedist who examined the plaintiff on June 21, 2011.

Dr. Haas states:

"On August 26, 2009, plaintiff presented herself to my office with complaint of neck and mid and lower back pain. She also complained of experiencing headaches.

I maintain an office located at 657 Central Avenue. Lower leve, Cedarhurst, NY 11516.

On August 26, 2009, plaintiff presented herself to my office with complaint of neck and mid and low4er back pain. She also complained of experiencing headaches.

Examination of the cervical spine revealed that Ms. Pinz had spastic and tender deep paraspinal musculature on the left upper and lower cervical musculature as well as the upper thoracic region. It also revealed tender trigger points palpated along the left trapezius ridges as well as thoracic and lumbar paraspinals bilaterally.

Range of motion testing of the cervical spine performed on August 26, 2009 by me revealed:

	Normal	Examination	% Loss
Flexion	45 degrees	25 degrees	44.44%
Extension	45 degrees	10 degrees	77.77%
Right Lat Flex	45 degrees	25 degrees	44.44%
Left Lat Flex	45 degrees	15 degrees	66.66%
Right Rotation	80 degrees	45 degrees	43.75%
Left Rotation	80 degrees	40 degrees	50.00%

Examination of the lumbar spine revealed that Ms. Pinz had spasic and deep tendon paraspinal muscular in the thoracolumbar, lumbar and lumbar sacral region left side. I also noted trigger points in the crector spine and quadratus lumborum muscles bilaterally. Bilateraly the following tests were positive: Kemps. Ely's SLR (30L, 45R).

Range of motion testing of the lumbar spine performed on August 26, 2009 revealed:

	Normal	Examination	%Loss
Flexion	90 degrees	70 degrees	22.22%
Extension	30 degrees	10 degrees	66.66%
Right Lat Flex	30 degrees	20 degrees	33.33%
Left Lat Flex	30 degrees	20 degrees	33.33%
Right Rotation	30 degrees	20 degrees	33.33%
Left Rotation	30 degrees	20 degrees	33.33%

I advised Ms. Pinz to undergo MIRs of the cervical spine and lumbar spine.

In addition to the physical examination of plaintiff, I reviewed the medical records, diagnostic testing results and MRI films respectively.

It is my opinion, within a reasonable degree of chiropractic certainty, that Ms. Pinz suffered a cervical disc syndrome, cervicobrachial syndrome, cerveocranial syndrome, thoracic myofascitis, thoracic disc syndrome and lumbar radiculitis. Further I believe that Ms. Pinz has suffered trauma to the cervical, thoracic and lumbar spine causing structural and functional altercations of those areas. The force induced by this accident has caused tears in the fibers of the ligaments and supporting structures, which normally prevent the vertebrae from deviating from their normal juxtaposition and range of motion.

It is my opinion that an injury of this type superimposed upon the cervical,

thoracic and lumbar spine can lead to premature degenerative disc changes which can result in a greater impairment and subsequent disability experienced by the plaintiff.

I advised Ms. Pinz to undergo a course of chiropractic treatment and physical therapy programs in the form of ultrasound hydrocollator, and/or muscle stimulation three times a week.

I believe that Ms. Pinz sustained a permanent consequential loss of function in her neck and back that has affected her daily life functions including heavy lifting and sitting for long period of time, to this day.

It is in my opinion, with a reasonable degree of chiropractic certainty, that the subject accident of August 26, 2009 was the competent producing cause of her injuries and that these injuries were causally related to the motor vehicle accident that occurred on August 26, 2009, which will result in permanent disability."

Dr. Rigney's affirmation as to the respective MRI's provides:

"The MRI of the lumbar spine revealed the following:

MALALIGNMENT AT L1-L2 AND A POSTERIOR BULGE
POSTERIOR BULGES AT L3-L4 AND L4-5

The MRI of the cervical spine revealed:

STRAIGHTENING OF THE CERVICAL CURVATURE
FUSION OF C6 AND C7
BULGED INTO THE PREVERTEBRAL SOFT TISSUES AT
C4-C5 AND C5-C6
POSTERIOR BULGE AT C5-C6

The MRI of the thoracic spine revealed:

STRAIGHTENING OF THE THORACIC CURVATURE WITH POSTERIOR MIDLINE TO LEFT SIDED DISC HERNIATIONS AT BOTH T7-T8 AND AT T10-T11."

Dr. Goldman's report sets forth:

"PROGNOSIS:

The prognosis regarding Sandye Pinz is guarded in view of the fact she has had sustained permanent Orthopaedic impairments to her cervical spine and thoracic spine based upon diagnostic testing.

Regarding her cervical spine, she has sustained a traumatic aggravation of a prior cervical fusion. Neurological evaluation and EMG and nerve conduction studies identified a right cervical radiculopathy and a bilateral CTS

that was not pre-existing and not related to the fusion that was done many years ago. She has sustained a painful functional restriction of motion of the cervical spine by more than 35%.

Regarding her thoracic spine, an MRI identified herniations at multiple levels. Despite undergoing a surgical instillation of epidural steroids she still continues to have pain in the thoracic spine that was related to the recent accident of 8/26/09.

In my opinion, the injury to her cervical spine and associated structures was causally related to her accident of 8/26/09 and at this time should be considered permanent.

Ms. Pinz asked me if there was any further treatment that could be suggested. She had discussed the possibility of surgery with the orthopaedic surgeons prior to this. She is a candidate to undergo a laser procedure for the removal of the thoracic disc and I have given her a prescription for this procedure. There would be nothing more than symptomatic treatment that I could recommend. She is advised to continue exercise and continue her yoga in addition to taking mild analgesics."

Upon review of the foregoing the plaintiff has raised an issue of fact as to whether the plaintiff suffered a serious injury pursuant to §5102 of the Insurance Law. As such, the defendant's application for an Order pursuant to CPLR §3212 dismissing the Complaint of the plaintiff, Sandye E. Pinz, with prejudice, on the ground that the plaintiff has not sustained a "serious injury" as defined by Insurance Law §5102(d), and granting summary judgment in favor of the defendant, is **denied**.

SO ORDERED.

DATED: 5/18/2012

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J.S.C.

ENTERED
MAY 17 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE