

Mu v Financial Servs. Vehicle Trust

2007 NY Slip Op 30903(U)

April 19, 2007

Supreme Court, Suffolk County

Docket Number: 0020621/2003

Judge: Robert W. Doyle

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SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 10-18-06
ADJ. DATE 1-5-07
Mot. Seq. # 005 MG; CASEDISP
Mot. Seq. # 006 XMG

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WEILEN MU and JAMES WANG,	:	SIBEN & SIBEN
	:	Attorneys for Plaintiffs
	:	90 East Main Street
Plaintiffs,	:	Bay Shore, NY 11706
	:	
- against -	:	NICOLINI, PARADISE, et al.
	:	Attys for Deft Financial Services
	:	114 Old Country Road
	:	Mineola, NY 11501
FINANCIAL SERVICES VEHICLE TRUST	:	
and S. GLASSER-MAYRSOHN,	:	PICCIANO & SCAHILL, P.C.
	:	Attys for Deft Glasser-Mayrsohn
Defendants.	:	900 Merchants Concourse, Suite 310
	:	Westbury, NY 11590
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Upon the following papers numbered 1 to 33 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12; Notice of Cross Motion and supporting papers 13 - 15; Answering Affidavits and supporting papers 16 - 31; Replying Affidavits and supporting papers 32 - 33; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that defendants motions for summary judgment dismissing the claims against them on the ground that the action is barred by Insurance Law §5104, as plaintiff Weilin Mu did not sustain a serious injury within the meaning of Insurance Law §5102 (d), are granted to the extent set forth herein; and it is

ORDERED that the cause of action for property damages is severed and continued.

This action was commenced to recover damages, personally and derivatively, for injuries and property loss allegedly sustained as a result of a rear-end collision that occurred on the Long Island Expressway on December 1, 2002. Plaintiff Weilin Mu, the driver of one of the vehicles, alleges in the

bill of particulars that she sustained various personal injuries in the accident, including a soft tissue mass in her left finger requiring excisional biopsy; left carpal tunnel syndrome; and subacromial bursitis with a rotator cuff strain in the left shoulder. The bill of particulars further alleges that plaintiff underwent ambulatory surgery on May 12, 2003 to correct the injury to her left finger; that she was totally disabled from the date of surgery to May 23, 2003; and that she remains partially disabled.

Defendants now move for summary judgment dismissing the claims against them on the ground that plaintiff Mu is precluded by Insurance Law §5104 from recovering for non-economic loss, as she did not sustain a “serious injury” within the meaning of Insurance Law §5102 (d). Defendants’ submissions in support of the motions include copies of the pleadings; a transcript of plaintiff’s deposition testimony; and sworn medical reports prepared by Dr. Richard Pearl, Dr. Jay Nathan, and Dr. Harvey Lefkowitz. At defendant S. Glasser-Mayrsohn’s request, Dr. Pearl, a neurologist, and Dr. Nathan, an orthopedist, examined plaintiff in February and March 2006. Dr. Lefkowitz, a radiologist, conducted an independent review of a CT scan of plaintiff’s cervical spine performed by Stony Brook Medical Imaging in March 2003.

Plaintiffs oppose the motions, arguing that defendants failed to submit objective medical evidence demonstrating that plaintiff Mu did not sustain a permanent consequential or significant limitation of use of her left hand, left shoulder and cervical spine as a result of the accident. Plaintiffs argue that defendants also failed to show that plaintiff Mu did not sustain a nonpermanent injury within the 90/180 category. Alternatively, plaintiffs assert that the affirmed medical report and records of Dr. Edward Wang raise a triable issue as to whether plaintiff sustained permanent and significant limitation of use of the cervical region and the left shoulder due to injuries suffered in the accident.

Insurance Law § 5102 (d) defines “serious injury” 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 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.”

A defendant seeking summary judgment on the ground that a plaintiff’s negligence claim is barred under the No-Fault Insurance Law bears the initial burden of establishing a prima facie case that the plaintiff did not sustain a “serious injury” (*see, Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 746 NYS2d 865 [2002]; *Gaddy v Eyley*, 79 NY2d 955, 582 NYS2d 990 [1992]). When a defendant seeking summary judgment based on the lack of serious injury relies on the findings of the defendant’s own witnesses, “those findings must be in admissible form, i.e., affidavits and affirmations, and not unsworn reports” to demonstrate entitlement to judgment as a matter of law (*Pagano v Kingsbury*, 182 AD2d 268, 270, 587 NYS2d 692 [2d Dept 1992]). A defendant also may establish entitlement to summary judgment using the plaintiff’s deposition testimony and medical reports and records prepared by the plaintiff’s own physicians (*see, Fragale v Geiger*, 288 AD2d 431, 733 NYS2d 901 [2d Dept 2001]; *Torres v Micheletti*, 208 AD2d 519, 616 NYS2d 1006 [2d Dept 1994]; *Craft v Brantuk*, 195 AD2d 438, 600 NYS2d 251 [2d Dept 1993]; *Pagano v Kingsbury, supra*). Once a defendant meets this burden, the

plaintiff must present proof in admissible form which creates a material issue of fact or demonstrate an acceptable excuse for failing to meet the requirement of tender in admissible form (*Gaddy v Eyster, supra; Pagano v Kingsbury, supra; see, Grasso v Angerami, 79 NY2d 813, 580 NYS2d 178 [1991]; see generally, Zuckerman v City of New York, 49 NY2d 557, 427 NYS2d 595 [1980]*).

The evidence presented by defendant Glasser-Mayrsohn establishes prima facie that plaintiff Mu did not suffer a serious injury as a result of the accident (*see, Hasner v Budnik, 35 AD3d 366, 826 NYS2d 387 [2d Dept 2006]; Meely v 4 G's Truck Renting Co., 16 AD3d 26, 789 NYS2d 277 [2d Dept 2005]; Abrahamson v Premier Car Rental of Smithtown, 261 AD2d 562, 691 NYS2d 83 [2d Dept 1999]*). At a deposition conducted on January 23, 2006, plaintiff testified that the accident occurred on a Sunday, that she first sought medical attention from her family doctor the next day, and that she only missed one day of work immediately after the accident. She testified that about one week after the accident she developed a lump at the tip of her left middle finger about one week after the accident. Plaintiff testified that did not seek any treatment for her injuries again until March 2003, at which time she began treating with a neurologist, Dr. Poole, for pain and numbness in her left shoulder, arm and hand. She testified that around the same time she also started treating with an orthopedist, Dr. Edward Wang, who performed surgery on her left middle finger in May 2003, and treated her shoulder pain with an injection of hydrocortisone. Plaintiff testified that she missed two to three weeks of work following the surgery on her finger, and that she has had decreased sensation in the top portion of the finger since the surgery. Plaintiff also testified that after her hand surgery she did not seek medical care for her shoulder until April 2005, and that such care was limited to an injection of hydrocortisone into her left shoulder. Finally, plaintiff testified that she has not had any problems with her left wrist as a result of the accident.

Dr. Nathan's sworn report states that plaintiff presented with complaints of pain in her left shoulder and left hand, numbness in her left middle finger, and difficulty bending and lifting. It also notes that plaintiff reported having surgery on her left middle finger in May 2003. The report states, among other things, that there was no tenderness, heat, swelling, erythema or effusion in the upper extremities; that plaintiff exhibited full range of motion in her shoulders, elbows, wrists and hands; that objective testing of the shoulder region for rotator cuff tear and for impingement or rupture of the supraspinatus muscle was negative; and that objective testing of the wrist/hand region for nerve compression, carpal tunnel syndrome, tenosynovitis and osteoarthritis was negative. It states that plaintiff demonstrated normal joint function in her cervical and lumbar regions, and that the straight leg raise test was negative in both the sitting and supine position. It states that plaintiff's gait, motor strength, and reflexes were normal, and that plaintiff was able to get on and off of the examining table without difficulty. The report also states that plaintiff's sensation was normal, except for decreased sensation in her left middle finger. Dr. Nathan concludes that plaintiff suffered sprains to her shoulder and lumbar region, that such injuries have healed, and that she is capable of working without restrictions.

Similarly, Dr. Pearl's report states that plaintiff demonstrated normal range of motion in her cervical and lumbar regions; that there was no evidence of paravertebral tenderness or spasm; that the straight leg raise test was negative; and that Tinel's sign was negative at the wrists and elbows. It states that plaintiff had normal motor strength and tone in her extremities, that her deep tendon reflexes were normal, and that there was no evidence of atrophy or fasciculations. Dr. Pearl's report states that plaintiff's

sensation was intact to pin prick, light touch, vibration, and joint position sense, except for decreased pin prick sensibility distal to a scar on the left middle finger. Dr. Pearl opines that plaintiff sustained a cervical sprain, which has resolved, and injuries to her left hand and shoulder. Although deferring conclusions regarding the condition of plaintiff's left shoulder and hand to an orthopedist, Dr. Pearl does conclude that plaintiff's examination revealed no evidence of carpal tunnel syndrome.

The burden, therefore, shifted to plaintiffs to raise a triable issue of fact (*see, Gaddy v Eyster, supra*). A plaintiff claiming injury within the "limitation of use" categories must substantiate his or her complaints of pain with objective medical evidence showing the extent or degree of the limitations of movement and their duration (*see, Laruffa v Yui Ming Lau*, 32 AD3d 996, 821 NYS2d 642 [2d Dept 2006]; *Cerisier v Thibiu*, 29 AD3d 507, 815 NYS2d 140 [2d Dept 2006]; *Meyers v Bobower Yeshiva Bnei Zion*, 20 AD3d 456, 797 NYS2d 773 [2d Dept 2005]). He or she must present medical proof contemporaneous with the accident showing the initial restrictions in movement or an explanation for its omission (*see, Bell v Rameau*, 29 AD3d 839, 814 NYS2d 534 [2d Dept 2006]; *Suk Ching Yeung v Rojas*, 18 AD3d 863, 796 NYS2d 661 [2d Dept 2005]; *Ifrach v Neiman*, 306 AD2d 380, 760 NYS2d 866 [2d Dept 2003]), as well as objective medical findings of limitations that are based on a recent examination of plaintiff (*see, Laruffa v Yui Ming Lau, supra; Murray v Hartford*, 23 AD3d 629, 804 NYS2d 416 [2d Dept 2005], *lv denied* 6 NY3d 713, 816 NYS2d 748 [2006]; *Batista v Olivo*, 17 AD3d 494, 795 NYS2d 54 [2d Dept 2005]; *Kauderer v Penta*, 261 AD2d 365, 689 NYS2d 190 [2d Dept 1999]). In addition, a plaintiff claiming serious injury who terminates treatment after the accident must offer a reasonable explanation for having done so (*Pommells v Perez*, 4 NY3d 566, 574, 797 NYS2d 380 [2005]; *see, Joseph v Layne*, 24 AD3d 516, 808 NYS2d 253 [2d Dept 2005]; *Ali v Vasquez*, 19 AD3d 520, 797 NYS2d 528 [2d Dept 2005]; *Batista v Olivo, supra*).

Contrary to the assertions by plaintiffs' counsel, the sworn medical evidence offered in opposition is insufficient to raise a triable issue of fact as to whether plaintiff sustained an injury within either the significant limitation of use category or the 90/180 category. Significantly, Dr. Wang's report states, among other things, that plaintiff demonstrated full range of motion in all of her extremities and in her cervical region, as well as full motor strength in her extremities, at her initial examination in March 2003. It states that plaintiff had a mobile mass over the distal interphalangeal joint of the left middle finger, and that plaintiff reported pins and needles in the left hand during testing for nerve compression. It also states that objective testing of the left shoulder suggested rotator cuff disease. Dr. Wang's report states that his diagnoses after the first examination of plaintiff was median nerve neuropraxia, a temporary nerve condition, in the left hand; left rotator cuff strain; and a tissue mass in the left finger. It states that physical therapy was prescribed for plaintiff's left shoulder injury, and that surgery was performed on the left middle finger to remove a benign fibrous tissue mass.

Further, Dr. Wang's report indicates that at a follow-up visit in June 2003, plaintiff reported that her left shoulder was feeling better and that the numbness in her left finger had resolved. It states that plaintiff had normal range of motion in her left shoulder and hand; that she had normal range of motion in all extremities and her neck; that objective testing of the left shoulder for subacromial impingement and rotator cuff tendonitis was negative; and that she had normal sensation in her left middle finger. The report states that a diagnosis of left rotator cuff tendonitis was made after an examination in October 2003, when plaintiff reported intermittent left shoulder pain and objective tests suggested rotator cuff pathology. However, the report also states that plaintiff demonstrated full joint function,

normal muscle strength and no sensory deficiencies in her upper extremities during the October 2003 exam. According to the report, plaintiff was examined again by Dr. Wang in February 2004 and in May 2006. At both of these examinations Dr. Wang determined that plaintiff had full range of motion and normal strength in her upper extremities, and that clinical tests for subacromial impingement, rotator cuff pathology and supraspinatus dysfunction were negative bilaterally. As provocative testing during the May 2006 elicited complaints of tenderness over the acromioclavicular joint of the left shoulder, Dr. Wang diagnosed plaintiff as having chronic acromioclavicular joint irritation and recurrent left rotator cuff irritation, and opined that such conditions would likely cause chronic shoulder pain unless plaintiff decided to undergo surgery. Further, Dr. Wang opines that the mass in plaintiff's left middle finger, which was diagnosed as a fibrolipoma, "is most likely not due to the car accident of December 1, 2002."

Thus, Dr. Wang's report is insufficient to raise a question as to whether plaintiff suffered a permanent consequential or a significant limitation of use of her cervical spine or her left shoulder, as it fails to indicate any restrictions in joint function as a result of the alleged injuries (*see, Iusmen v Konopka*, ___ AD3d ___, 2007 WL 766192 [2d Dept, March 13, 2007]; *Zinger v Zylberberg*, 35 AD3d 851, 828 NYS2d 128 [2d Dept 2006]; *Ranzie v Abdul-Massih*, 28 AD3d 447, 813 NYS2d 473 [2d Dept 2006]; *Alvarez v Green*, 304 AD2d 509, 758 NYS2d 128 [2d Dept 2003]). Rather, the report states that while plaintiff complained of pain, she exhibited "normal range of motion" in her cervical region and left shoulder, as well as normal joint function, muscle strength and sensation in her upper extremities. There also is no indication in Dr. Wang's report that plaintiff suffered a "medically determined injury" that prevented her from performing substantially all of her usual daily activities for at least 90 days of the 180 days after the accident. Further, Dr. Wang's conclusion that the tumor on plaintiff's left middle finger was "likely not due to the car accident" controverts the allegations in the pleadings that such condition was caused by the accident.

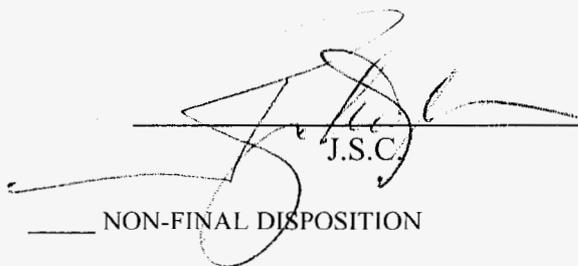
As to the remaining medical evidence offered by plaintiffs, the sworn report of Dr. Poole, plaintiff's treating neurologist, states that electromyography (EMG) and nerve conduction velocity (NCV) studies of plaintiff's upper extremities conducted in March 2003 were normal. The sworn reports prepared by Dr. Chernoff, an orthopedist, state that he examined plaintiff on April 4, April 11, and May 30, 2003, during which time she complained of left shoulder pain and left arm numbness. As to plaintiff's left shoulder, the reports state that plaintiff exhibited "170 degrees of shoulder elevation," positive impingement sign, and "good internal and external rotation." Dr. Chernoff's May 30, 2003 follow-up report contains the diagnoses of impingement syndrome of the left shoulder with bursitis, lower back pain, and mild sciatica, yet the cause of these conditions is not addressed. An MRI report concerning plaintiff's left shoulder dated April 10, 2003 states that the scans revealed "slight chronic impingement syndrome upon the supraspinatus muscle-tendon complex," "slightly heterogeneous signal within the supraspinatus tendon, suggestive of slight degeneration and/or slight tendinitis," minimal swelling of the subacromial-subdeltoid bursa, and no evidence of rotator cuff tear or glenoid labral tear. A CT report concerning plaintiff's cervical spine states simply that plaintiff appears to have a mild to moderate disc bulge at level C6-C7 of her cervical spine.

Dr. Chernoff's reports are insufficient to defeat summary judgment, as his last examination of plaintiff occurred in May 2003 (*see, Mejia v DeRose*, 35 AD3d 407, 825 NYS2d 722 [2d Dept 2006]; *Burgos v Vargas*, 33 AD3d 579, 822 NYS2d 297 [2d Dept 2006]; *Yakubov v CG Trans Corp.*, 30 AD3d 509, 817 NYS2d 353 [2d Dept 2006]; *Suk Ching Yeung v Rojas*, 18 AD3d 863, 796 NYS2d 661

[2d Dept 2005]). Further, his reports do not indicate the objective tests performed during plaintiff's examinations or how the finding of 170 degrees of shoulder elevation was calculated (*see, Murray v Hartford*, 23 AD3d 629, 804 NYS2d 416 [2d Dept 2005], *lv denied* 6 NY3d 713, 816 NYS2d 748 [2006]; *Ersop v Variano*, 307 AD2d 951, 763 NYS2d 482 [2d Dept 2003]; *Kassim v City of New York*, 298 AD2d 431, 748 NYS2d 265 [2d Dept 2002]; *Delgado v Hakim*, 287 AD2d 592, 732 NYS2d 233 [2d Dept 2001]; *Sainte-Aime v Ho*, 274 AD2d 569, 712 NYS2d 133 [2d Dept 2000]). They also do not contain an assessment of the significance or permanency of plaintiff's injuries (*see, Bennett v Genas, supra*), or discuss the nature and extent of treatment provided to plaintiff (*see, Nixon v Muntaz*, 1 AD3d 329, 766 NYS2d 593 [2d Dept 2003]; *Smith v Askew*, 264 AD2d 834, 695 NYS2d 405 [2d Dept 1999]). The affirmed MRI and CT reports prepared by plaintiff's treating radiologists are insufficient to raise an issue as to the cause or significance of plaintiff's alleged shoulder and cervical injuries, and the EMG/NCV studies show normal nerve function in her upper extremities. In any event, it well established that the mere existence of a herniated or bulging disc, in and of itself, is not evidence of a serious injury (*see, Umanzor v Pineda*, __ AD3d __, 2007 WL 1016894 [2d Dept, April 3, 2007]; *Iusmen v Konopka, supra*; *Yakubov v CG Trans Corp., supra*; *Kearse v New York City Tr. Auth., supra*), and that a plaintiff's subjective complaints of pain are insufficient to raise a triable issue of fact (*see, Ranzie v Abdul-Massih, supra*; *Kinchler v Cruz*, 22 AD3d 808, 802 NYS2d 754 [2d Dept 2005]; *Cennano v Themistokleous*, 22 AD3d 700, 804 NYS2d 401 [2d Dept 2005]; *Barrett v Howland*, 202 AD2d 383, 608 NYS2d 681 [2d Dept 1994]).

Accordingly, the motions for summary judgment are granted to the extent that the causes of action seeking damages for personal injuries are dismissed on the ground that plaintiff Mu's injuries do not meet the serious injury threshold.

Dated: APR 19 2007


J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION