

Kasel v Szczencina

2006 NY Slip Op 30564(U)

December 11, 2006

Supreme Court, Suffolk County

Docket Number: 04-17812

Judge: Robert W. Doyle

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

P R E S E N T :

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 6-6-06
ADJ. DATE 9-7-06
Mot. Seq. # 001 - MG; CASEDISP

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TAMY J. KASEL,	:	DECOLATOR, COHEN & DIPRISCO
	:	Attorneys for the Plaintiff
Plaintiff,	:	1527 Franklin Avenue, Suite 200
	:	Mineola, New York 11501
- against -	:	
	:	MARVIN JAY BERKELEY, ESQ.
	:	Attorney for the Defendant
JAN SZCZENCINA,	:	50 Charles Lindbergh Blvd.
	:	Uniondale, New York 11553
Defendant.	:	
-----X	:	

Upon the following papers numbered 1 to 28 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 10a, 10b; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 11 - 18, 19 - 23; Replying Affidavits and supporting papers 24 - 26; Other Memorandum of Law 27 - 28; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that defendant’s motion for summary judgment in his favor dismissing the complaint on the ground that plaintiff did not sustain a “serious injury” as defined in Insurance Law § 5102 (d), is granted.

This is an action to recover damages for serious injuries allegedly sustained by plaintiff as a result of a motor vehicle accident that occurred on the eastbound side of the Long Island Expressway at or near its intersection with exit 53, County of Suffolk, State of New York on June 2, 2004. The accident allegedly happened when the vehicle operated by the plaintiff was rear-ended by the vehicle owned and operated by the defendant. Defendant now moves for summary judgment dismissing the complaint on the grounds that plaintiff did not sustain a “serious injury” as defined in Insurance Law § 5102 (d). Plaintiff opposes this motion and defendant has filed a reply.

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

Kasel v Szczencina
Index No. 04-17812
Page No. 2

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 order to recover under the "permanent loss of use" category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (*Oberly v Bangs Ambulance Inc.*, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the "permanent consequential limitation of use of a body organ or member" or a "significant limitation of use of a body function or system" categories, either a specific percentage of the loss of range of motion must be ascribed or there must be a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (*Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 746 NYS2d 865 [2000]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]).

It is for the court to determine in the first instance whether a prima facie showing of "serious injury" has been made out (*Tipping-Cestari v Killhenny*, 174 AD2d 663, 571 NYS2d 525 [2d Dept 1991]). The initial burden is on the defendant "to present evidence, in competent form, showing that the plaintiff has no cause of action" (*Rodriguez v Goldstein*, 182 AD2d 396, 582 NYS2d 395, 396 [1st Dept 1992]). Once defendant has met the burden, plaintiff must then, by competent proof, establish a prima facie case that such serious injury exists (*Gaddy v Eyler*, 79 NY2d 955, 582 NYS2d 990 [1992]). Such proof, in order to be in a competent or admissible form, shall consist of affidavits or affirmations (*Pagano v Kingsbury*, 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]). The proof must be viewed in a light most favorable to the nonmoving party, here, the plaintiff (*Cammarere v Villanova*, 166 AD2d 760, 562 NYS2d 808 [3d Dept 1990]).

In support of this motion, defendant submits, *inter alia*, the plaintiff's verified bill of particulars; the transcript of the plaintiff's deposition testimony; the unsworn report dated July 24, 2004 of plaintiff's treating chiropractor, Joseph Adamo, D.C.; the affirmed report dated January 30, 2006 of defendant's examining orthopedist, Leon Sultan, M.D.; and the two affirmed reports each dated January 31, 2005 of defendant's examining radiologist, A. Robert Tantleff, M.D.

Plaintiff claims that she sustained lumbar disc herniations; cervical disc bulges; cervical sprains; lumbar sprains; and subcutaneous fluid in the anterior medial lower left leg. Plaintiff also claims that she sustained a "serious injury" in the categories of a permanent loss of use, a permanent consequential limitation, a significant limitation, and a non-permanent injury.

Plaintiff testified that she was employed by Marjon Eyewear at the time of the accident, and that she lost approximately four days from work as a result of her injuries. When she went back to

Kasel v Szczencina
Index No. 04-17812
Page No. 3

her job, she had “limited mobility” and could not do any lifting or bending. She also could not sit or stand for too long. She treated with Dr. Adamo, a chiropractor, for about six or seven months, but did not remember the last time that she received treatment. She stopped treatment because her insurance carrier limited the number of allowed visits and because it was difficult for her to make appointments. Plaintiff further testified that she is currently employed as an administrative assistant for a home builder in Melbourne, Florida.

Dr. Adamo states that he performed an EMG/NCV of plaintiff’s cervical spine on July 27, 2004, and his findings include normal velocities in all nerves tested and no evidence of entrapment, compression or peripheral neuropathy. Dr. Adamo opined that these studies were each normal.

Dr. Sultan states that he performed an independent orthopedic examination of the plaintiff on January 30, 2006, and his findings include normal sensory testing of the upper extremities; no active paracervical muscle spasm, no trigger points over the trapezius musculature; no evidence of any localized swelling, deformity or discoloration of the ankles or knees; knee reflexes that were symmetrical; and a negative straight leg raising test bilaterally. He also observed that cervical extension, flexion, right/left rotation and right/left lateral tilt were 30, 45, 55/55, and 25/25 degrees, compared with the normal ranges of 25-35, 40-50, 45-60 and 20-30 degrees. Additionally, he noted that forward flexion, extension, right/left rotation, and right/left lateral tilt were 65, 15, 55, 20-25 degrees, with the normal ranges being, 60-90, 10-15, 45-70, and 20-25 degrees. Dr. Sultan opined that his examination revealed that plaintiff was orthopedically stable and neurologically intact.

Dr. Tantleff states that he performed an independent radiological examination of the MRI studies of the plaintiff’s cervical spine dated July 11, 2004, and his findings include mild diffuse degeneration and desiccation of the visualized intervertebral discs; mild diffuse discovertebral endplate spurring; and diffuse facet arthropathy. He also found that there was no evidence of compression, deviation or displacement; no evidence of lesions, fractures or subluxations; no evidence of edema; and no evidence of swelling of the prevertebral soft tissue space. In addition, he observed no evidence of nerve root compression, disc bulge, protrusion or herniation. He opined that Dr. Adamo’s findings of neuropathy or radiculopathy of the cervical spine were not causally related to the accident. Dr. Tantleff states in his other report that he performed an independent radiological examination of the MRI studies of the plaintiff’s lumbar spine dated July 11, 2004, and his findings include degeneration and desiccation of the visualized intervertebral discs; retrolisthesis of the first degree of L4 on L5; discovertebral endplate spurring; regional facet arthropathy; and an atraumatic noncompressive disc bulge at L5-S1. He also found no evidence of spasm, contusion, edema, fractures or subluxations. Dr. Tantleff opined that these studies showed chronic degenerative disc disease, spondylosis and juvenile degenerative disc disease which were unrelated to the accident.

By his submission, defendant made a prima facie showing that plaintiff did not sustain a serious injury (*see, Oberly v Bangs Ambulance Inc., supra; Ranzie v Abdul-Massih*, 28 AD3d 447, 813 NYS2d 473 [2d Dept 2006]; *Wright v Peralta*, 26 AD3d 489, 809 NYS2d 465 [2d Dept 2006];

Kasel v Szczencina
Index No. 04-17812
Page No. 4

Mercado v Garbacz, 16 AD3d 631, 792 NYS2d 519 [2d Dept 2005]; *Temple v Doherty*, 301 AD2d 979, 755 NYS2d 448 [3d Dept 2003]; *Craft v Brantuk*, 195 AD2d 438, 600 NYS2d 251 [2d Dept 1993]). Dr. Sultan found that plaintiff had a normal range of motion of the cervical spine with no detectable muscle spasm (see, *Aponte v Tusa*, 28 AD3d 407, 811 NYS2d 569 [2d Dept 2006]; *Willis v New York City Transit Auth.*, 14 AD3d 696, 789 NYS2d 223 [2d Dept 2005]). Also, Dr. Tantleff concluded, from his review of plaintiff's MRI studies, that these films showed chronic degenerative changes to the cervical and lumbar spine (see, *Pommells v Perez*, 4 NY3d 566, 797 NYS2d 380 [2005]). The defendant's remaining evidence, including affirmed reports by his examining radiologist and plaintiff's deposition testimony, also demonstrates that the plaintiff did not sustain a serious injury (see, *Farozes v Kamran*, 22 AD3d 458, 802 NYS2d 706 [2d Dept 2005]; *Teodoru v Conway Transp. Svc.*, 19 AD3d 479, 798 NYS2d 466 [2d Dept 2005]). As defendant has met his burden as to all categories of serious injury alleged by the plaintiff, the Court turns to plaintiff's proffer (see, *Franchini v Palmieri*, 1 NY3d 536, 775 NYS2d 232 [2003]; *Dongelewic v Marcus*, 6 AD3d 943, 774 NYS2d 841 [3d Dept 2004]).

In opposition to this motion, plaintiff submits, among other things, the two affidavits of the plaintiff; the two affirmed reports dated July 12, 2004 of plaintiff's treating radiologist, Mark Shapiro, M.D.; the affirmed report dated October 4, 2004 of plaintiff's other treating radiologist, Jayne M. Bernier, M.D.; and the affidavit sworn to on July 13, 2006 of plaintiff's treating chiropractor, Dr. Joseph Adamo. Initially, the Court notes that Dr. Adamo's affidavit is deficient to the extent that he attempts to render a medical diagnosis or prognosis outside the scope of chiropractic practice (see, Education Law § 6551; *McGuirk v Vedder*, 271 AD2d 731, 706 NYS2d 485 [3d Dept 2000]; *Crozier v Lesniewski*, 195 AD2d 657, 599 NYS2d 729 [3d Dept 1993]). Also, the findings of Dr. Adamo, which are based upon the MRI studies of plaintiff's physicians, have not been considered as he does not state whether he reviewed the actual MRI films of the plaintiff's cervical spine, lumbar spine or left leg (see, *Shay v Jerkins*, 263 AD2d 475, 692 NYS2d 730 [2d Dept 1999]; *Merisca v Alford*, 243 AD2d 613, 663 NYS2d 853 [2d Dept 1997]).

Plaintiff states, inter alia, that after the accident, she was brought to the emergency room at Southside Hospital and complained of head, neck, left leg pain and numbness. Six days later, she treated with Dr. Adamo and remained under his care for approximately six or seven months. She stopped treating with Dr. Adamo because her employment duties made it difficult to schedule appointments with him and because she could not afford to undergo treatment. She recently visited a walk-in medical clinic on June 6, 2006 where she was examined and treated for neck and back pain. As a result of her injuries she cannot sit or stand for more than one hour and cannot carry heavy objects. She also cannot drive for more than one hour intervals. Plaintiff further alleges that she has difficulty dressing, bending, stooping and getting in and out of her car.

Dr. Shapiro states in one of his reports that he performed MRI studies of the plaintiff's cervical spine on July 11, 2004, and his findings include straightening of the cervical lordosis; and vertebral bodies of normal height and signal. While he observed focal bulges at C4-5 and C5-6, he also found that there was no significant central spinal stenosis, and that the neural foramen were

Kasel v Szczencina
Index No. 04-17812
Page No. 5

patent. Dr. Shapiro states, in his other report, that he performed MRI studies of the plaintiff's lumbar spine on July 11, 2004, and his findings include preservation of the normal lordosis, vertebral bodies of normal height, and no abnormal signal in the surrounding soft tissues. He also observed, however, that there were central disc herniations at L4-5, and L5-S1 with signal loss.

Dr. Bernier states that she performed MRI studies of the plaintiff's left lower leg on October 4, 2004, and her findings include areas of fluid signal in the anterior medial shin, and additional fluid "extending through the subcutaneous fat just anterior to the normal appearing distal tibia." She also observed, however, that the fascial planes were maintained, and that the underlying muscles were of normal contour and signal. Dr. Bernier opined that there was no evidence of muscular injury, fracture, bone contusion, or hematoma.

Dr. Adamo states that he performed an initial chiropractic examination of the plaintiff on June 8, 2004, and his findings include reflexes that were 2+/5 and symmetrically normal except for the brachioradialis which was "0/5"; and a motor examination that was normal at "5/5" except for the left brachioradialis at "4/5." His cervical and lumbar range of motion testing at that time showed deficits in flexion, extension, left/right rotation, and left/right lateral flexion as well as paraspinal muscle spasm and myofascial trigger points. His x-rays also showed vertebral body malpositions and decreased interosseous spacing at C7-T1. He opined that plaintiff sustained injuries to her cervical and lumbar spine as a result of the accident. He re-examined plaintiff on July 13, 2004, and performed an EMG/NCV on August 26, 2004, which he opined showed left L5-S1 radiculopathy. Plaintiff continued her care at his office until approximately January, 2005, at which time he opined that the prognosis for a full and complete recovery was poor. He re-examined plaintiff on June 30, 2006 and observed limitations in plaintiff's cervical and lumbar ranges of motion along with palpable paraspinal muscle spasm. He also noted plaintiff's various complaints of pain and limitations of activities at that time. Dr. Adamo opines that plaintiff has sustained significant injuries to her cervical and lumbar spine which were a direct result of the accident. In addition, Dr. Adamo again noted plaintiff's complaints of having difficulty with the activities of her daily living.

While a disc herniation may constitute a serious injury, the cervical and lumbar MRI reports of Dr. Shapiro is not probative for the purposes of demonstrating a serious injury because it contains no opinion as to causation (see, *Collins v Stone*, 8 AD3d 321, 778 NYS2d 79 [2d Dept 2004]), and does not establish the extent of the alleged physical limitations resulting from the alleged disc injuries and their duration (see, *Yakubov v CG Trans Corp.*, 30 AD3d 509, 817 NYS2d 353 [2d Dept 2006]; *Nelson v Amicizia*, 21 AD3d 1015, 803 NYS2d 87 [2d Dept 2005]). Further, plaintiff's treating chiropractor has failed to address the pre-existing degenerative condition of her cervical and lumbar spine as diagnosed by defendant's examining radiologist, as he did not provide any foundation or objective medical basis supporting the conclusions which he reached, namely, that the alleged cervical and lumbar spine condition was causally related to the accident (see, *Knoll v Seafood Express*, 5 NY3d 817, 803 NYS2d 25 [2005]; *Franchini v Palmieri*, supra; *Gomez v Epstein*, 29 AD3d 950, 818 NYS2d 101 [2d Dept 2006]; *Flores v Leslie*, 27 AD3d 220, 810 NYS2d 464 [1st Dept 2006]). In any event, Dr. Adamo has not provided an adequate explanation for the end


Kasel v Szczencina
Index No. 04-17812
Page No. 6

of plaintiff's treatments in January, 2005, and his most recent re-examination of her on July 30, 2006 (see, *Nixon v Muntaz*, 1 AD3d 329, 766 NYS2d 593 [2d Dept 2003]; *Pierre v Nanton*, 279 AD2d 621, 719 NYS2d 706 [2d Dept 2001]; *Davis v Brightside Fire Protection Inc.*, 275 AD2d 298, 712 NYS2d 567 [2d Dept 2000]). Plaintiff's gap in treatment was, in essence, a cessation of treatment which she has failed to adequately address by way of competent medical proof (see, *Pommells v Perez*, *supra*; *McConnell v Ouedraogo*, 24 AD3d 423, 805 NYS2d 418 [2d Dept 2005]; *Ketz v Harder*, 16 AD3d 930, 793 NYS2d 203 [3d Dept 2005]).

While plaintiff has submitted an affidavit listing various physical ailments and limitations, her subjective complaints of pain do not constitute a significant injury within the meaning of the statute (see, *Faroze v Kamran*, *supra*; *Ali v Vasquez*, 19 AD3d 520, 797 NYS2d 528 [2d Dept 2005]; *Iglesias v Inland Freightways, Inc.*, 209 AD2d 479, 619 NYS2d 59 [2d Dept 1994]). Additionally, the proof submitted by plaintiff is insufficient to raise a triable issue of fact that she sustained a medically determined injury or impairment rendering her unable to substantially perform all of her usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident (see, *Mercado v Garbacz*, 16 AD3d 631, 792 NYS2d 519 [2d Dept 2005]; *Omar v Goodman*, 295 AD2d 413, 743 NYS2d 568 [2d Dept 2002]; *Gjelaj v Ludde*, 281 AD2d 211, 721 NYS2d 643 [1st Dept 2001]). Thus, plaintiff has provided insufficient medical proof to raise an issue of fact that she sustained a serious injury (see, *Magarin v Kropf*, 24 AD3d 733, 807 NYS2d 398 [2d Dept 2005]; *Fitzmaurice v Chase*, 288 AD2d 651, 732 NYS2d 690 [3d Dept 2001]; *Tirado v Craig*, 241 AD2d 449, 663 NYS2d 831 [2d Dept 1997]).

Since there is no evidence in the record demonstrating that plaintiff's alleged economic loss exceeded the statutory amount of basic economic loss, her claim in this regard must also be dismissed (see, CPLR 3212 (b); see, *Rulison v Zanella*, 119 AD2d 957, 501 NYS2d 487 [3d Dept 1986]). Accordingly, this motion for summary judgment is granted.

Dated: DEC 11 2006



J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION