Quinones v Weaver
2007 NY Slip Op 30054(U)
March 5, 2007
Supreme Court, Suffolk County
Docket Number: 0003786
Judge: Robert W. Doyle
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SHORT FORM ORDER

INDEX No. 05-3786
CAL. No. 06-01927-MV

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

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 9/25/06
ADJ. DATE 11/27/06
Mot. Seq. # 001 - MG; CASEDISP

ILIA QUINONES,

Plaintiff,

- against -

MARILYN WEAVER,

Defendant.

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

ORDERED that defendants' motion for summary judgment 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 Stony Brook Road at its intersection with Hallock Road, Stony Brook, New York on December 2, 2003. The accident allegedly happened when the vehicle owned and operated by the defendant impacted the vehicle operated by the plaintiff. Defendant now moves for summary judgment dismissing the complaint on the ground 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 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 Kilhenny***, 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 her motion, defendant submits, inter alia, the pleadings; plaintiff's verified bill and supplemental bill of particulars; the affirmed report of defendant's examining neurologist, Mathew M. Chacko, M.D.; the affirmed report of defendant's examining orthopedist, Vartkes Khachadurian, M.D.; and the plaintiff's deposition transcript.

Plaintiff claims in her bill and supplemental bill of particulars that she sustained an impingement of the left shoulder; cubital tunnel bilaterally; a sprain/strain of the left elbow; sprains/strains of the cervical, thoracic and lumbar spine; and a miscarriage on May 25, 2004 during the first trimester. Plaintiff also claims in her bill of particulars that she was confined to a hospital for one day and to her home/bed for about six days. Plaintiff further claims that she was totally disabled for about six days and partially disabled from the date of the accident until the present time. Moreover, plaintiff 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 nonpermanent injury. While plaintiff claims that she suffered a miscarriage she has not claimed the serious injury category of a loss of a fetus.

In his affirmed report dated March 3, 2006, Dr. Chacko states that he performed an independent neurological examination of the plaintiff on that date, and his findings include an unremarkable cranial nerve examination; a normal motor examination with no atrophy or fasciculations; DTRs that were "2+"; and normal ranges of motion of the neck and lumbar spine. He also found that plaintiff's straight leg raising test was normal and that there was no tenderness or muscle spasm of the cervical, thoracic or lumbar areas. Dr. Chacko opined that plaintiff had sustained causally-related cervical and lumbar strains but that there were no observable focal neurological deficits. He further concluded that plaintiff was not disabled and that she was capable of performing the normal activities of her daily living, including work.

In his affirmed report dated March 3, 2006, Dr. Khachadurian states that he performed an independent orthopedic examination of plaintiff on that date, and his findings include no atrophy of the hand or upper extremities; a normal cervical lordosis with no spasm or shift; a normal lumbar kyphosis with no spasm; and a normal range of motion of the lower extremities. He also observed that her forward flexion, backward extension, right/left rotation, and right/left tilt of the lumbar spine were 80, 30, 45/45, and 30 degrees, with normal being 80 to 90, 30, 45/45, and 30/30 degrees. In addition, he noted that her forward cervical flexion was to the chin which is normal and that her backward extension, right/left rotation, and right/left tilt of the cervical spine were 70, 45/45 and 30/30 degrees, compared with the normal ranges of 70, 45/45, and 30/30 degrees. Dr. Khachadurian opined that plaintiff had sustained sprains of the cervical and lumbar spine and a shoulder sprain/contusion, all of which had resolved. He concluded that plaintiff had returned to her pre-accident state and that she was capable of performing her usual work activities unrestricted.

Plaintiff testified that she was driving her fiance's car at the time of the accident. She briefly lost consciousness but was not bleeding. She did not have a driver's license or a permit and was given a summons at the scene. She was then taken by ambulance to the emergency room at University Hospital at Stony Brook. At the hospital, she complained of pain to her neck, lower back, shoulder (unspecified) and left wrist; however, she was not pregnant. She was examined and released that day. A week after the accident, she saw Dr. Block, a chiropractor, with whom she continued to treat for about fifteen months, and she received physical therapy for about nine months. She began treatment with Dr. Chernoff in January 2004 in connection with her shoulder, arm and wrist pain and treated with him for about one year. She stopped treating when no-fault stopped paying for her medical treatment and had no future medical appointments. She missed about five days from work as a food server. She eventually stopped working because she had difficulty lifting things. In June 2004 she started cleaning houses two days per week, five hours per day. Plaintiff also testified that she had a miscarriage in May 2004; however, no one ever told her that her miscarriage was caused by the accident. She admitted that she not been to a gynecologist prior to the miscarriage because she did not like going to doctors. Afterwards, she treated with a doctor while on month-long vacation in Mexico. Plaintiff further testified that she took a second trip to Mexico in August 2005 which lasted about one and one-half months.

By her submissions, defendant made a prima facie showing that plaintiff did not sustain a serious injury (*see*, ***Wright v Peralta***, 26 AD3d 489, 809 NYS2d 465 [2d Dept 2006]; ***Farozes v Kamran***, 22 AD3d 458, 802 NYS2d 706 [2d Dept 2005]; ***Teoduro v Conway Transp. Serv***., 19 AD3d 479, 798 NYS2d 466 [2d Dept 2005]; ***Willis v New York City Trans. Auth***., 14 AD3d 696, 789 NYS2d 223 [2d Dept 2005]). Defendant's examining orthopedist found that plaintiff had a normal range of motion of the cervical spine and a normal cervical lordosis with no spasm or shift. In addition, he found that there were no atrophies of the hand or upper extremities. Similarly, defendant's examining neurologist found that plaintiff had normal ranges of motion of the neck and lumbar spine with no atrophy or fasciculations. Defendant's remaining evidence, including plaintiff's deposition testimony, also supports a finding that she did not sustain a serious injury. As defendant has met her burden as to all categories of serious injury alleged, 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, the plaintiff submits, inter alia, the affirmed report of plaintiff's treating radiologist, Joel Reiter, M.D.; the sworn report of plaintiff's treating chiropractor, Jeffrey M.

Block, M.D.; and the plaintiff's personal affidavit. At the outset, Dr. Block's report is deficient to the extent that he attempts to rely upon the unaffirmed reports of plaintiff's physicians (*see*, ***Sayas v Merrick Trans.***, 23 AD3d 367, 804 NYS2d 769 [2d Dept 2005]) and to the extent that he attempts to render a medical diagnosis or prognosis which is beyond the scope of chiropractic practice (*see*, Education Law § 6551; ***McGuirk v Vedder***, 271 NYS2d 731, 706 NYS2d 485 [3d Dept 2000]; ***Crozier v Lesniewski***, 195 AD2d 657, 599 NYS2d 729 [3d Dept 1993]).

In his report dated February 2, 2004, Dr. Reiter states that he performed MRI studies of the plaintiff's cervical spine on that date, and his findings include straightening of the cervical lordosis; minimal posterior bulging of the intervertebral discs at the C3-4, C4-5, and C5-6 levels; and minimal narrowing of the anterior subarachnoid space. He also observed that the vertebral bodies demonstrated normal height, alignment, and signal intensity. Additionally, he noted that the visualized portions of the cervical spinal cord and nerve roots were within normal limits.

In his report sworn on October 10, 2006, Dr. Block states that he performed a chiropractic examination of the plaintiff on that date, and his findings include a positive cervical compression test on the right; a positive Jackson's Compression Test on the right; a positive distraction test bilaterally; and a negative straight leg raising test bilaterally. He also found that plaintiff's cervical flexion, extension, right/left lateral flexion, and right/left rotation were 60, 16, 32/8, and 72/51 degrees, with the normal ranges being 50, 60, 45/45, and 80/80 degrees. Additionally, he observed that plaintiff's lumbar flexion, extension, and right/left flexion were 39, 15, and 13/13 degrees, with the normal ranges being 60, 25, and 35/35. Dr. Block opined that plaintiff had sustained a lumbar sprain and an acute exacerbation of a spinal subluxation. While he opined that plaintiff had sustained a 5-8% impairment of the cervical and lumbar spine, he also opined that she had no impairments with respect to self-care, standing, and ambulation.

Plaintiff alleges that she began a course of chiropractic treatment at Dr. Block's office a short time after the accident. She also alleges that she is unable to lift heavy objects, do her household laundry, or exercise. Additionally, plaintiff alleges that she is unable to sit or stand for more than one hour without pain.

Plaintiff has provided insufficient medical proof to raise an issue of fact that plaintiff sustained a serious injury under the no-fault law (*see*, ***Burke v Galli***, 242 AD2d 595, 664 NYS2d 742 [2d Dept 1997], *lv denied* 91 NY2d 806, 669 NYS2d 1 [1998]; ***Picott v Lewis***, 26 AD3d 319, 809 NYS2d 541 [2d Dept 2006]). While a disc herniation may constitute a serious injury, the cervical MRI report by Dr. Reiter 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, in any event, does not establish the duration of plaintiff's alleged injuries (*see*, ***Nelson v Amicizia***, 21 AD3d 1015, 803 NYS2d 87 [2d Dept 2005]; ***McKinney v Lane***, 288 AD2d 274, 733 NYS2d 456 [2d Dept 2001]; ***Elgendy v Nieradko***, 307 AD2d 251, 762 NYS2d 275 [2d Dept 2003]). Instead, the report of Dr. Block largely consists of unsubstantiated speculation concerning the causal relationship between the subject accident and plaintiff's condition several years later (*see*, ***Damstetter v Martin***, 247 AD2d 893, 668 NYS2d 863 [4th Dept 1998]) as well as conclusory assertions tailored to meet the statutory requirements (*see*, ***Khan v Hamid***, 19 AD3d 460, 798 NYS2d 444 [2d Dept 2005]; ***Gousgoulas v Melendez***, 10 AD3d 674, 782 NYS2d 103 [2d Dept 2004]). Dr. Block's diagnoses of a lumbar sprain and an acute exacerbation of a spinal subluxation is not explained, defined or specifically connected to plaintiff's limitations, and their

significance is not delineated (*see*, ***Davis v Evan***, 304 AD2d 1023, 758 NYS2d 203 [3d Dept 2003]). Further, the reports of plaintiff's treating physicians demonstrate that her injuries were mild, minor, or slight (*see*, ***Gonzalez v Green***, 24 AD3d 939, 805 NYS2d 450 [3d Dept 2005]; ***Moore v County of Suffolk***, 6 AD3d 408, 774 NYS2d 375 [2d Dept 2004]; ***Maenza v Letkajornsook***, 172 AD2d 500, 567 NYS2d 850 [2d Dept 1991]). Also, plaintiff failed to present any medical proof that was contemporaneous with the accident showing any initial range of motion restrictions in plaintiff's cervical, thoracic and lumbar spine, or any other affected body parts (*see*, ***Ramirez v Parache***, 31 AD3d 415, 818 NYS2d 238 [2d Dept 2006]; ***Yeung v Rojas***, 18 AD3d 863, 796 NYS2d 661 [2d Dept 2005]; ***Petinrin v Levering***, 17 AD3d 173, 794 NYS2d 12 [1st Dept 2005]). In any event, plaintiff has not provided an adequate explanation for the end of her medical treatments in 2004 and Dr. Block's most recent re-examination of her on October 10, 2006 (*see*, ***Nixon v Muntaz***, 1 AD3d 329, 766 NYS2d 593 [2d Dept 2003]; ***Pierre v Nanton***, *supra*). 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*, ***McConnell v Ouedraogo***, 24 AD3d 423, 805 NYS2d 418 [2d Dept 2005]; ***Ketz v Harder***, 16 AD3d 930, 793 NYS2d 203 [3d Dept 2005]). Moreover, plaintiff's subjective complaints of pain to her health care providers do not constitute a significant injury within the meaning of the statute (*see*, ***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 the 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*, ***Magarin v Kropf***, 24 AD3d 733, 807 NYS2d 398 [2d Dept 2005]; ***Hernandez v DIVA Cab Corp.***, 22 AD3d 722, 804 NYS2d 396 [2d Dept 2005]; ***Mercado v Garbacz***, 16 AD3d 631, 792 NYS2d 519 [2d Dept 2005]). Although plaintiff alleges, among other things, that she has difficulties lifting heavy objects and performing household chores, the record lacks objective proof of any substantial curtailment of her activities within the relevant time period after the accident (*see*, ***Nelson v Distant***, 308 AD2d 338, 764 NYS2d 258 [1st Dept 2003]; ***Keena v Trappen***, 294 AD2d 405, 742 NYS2d 344 [2d Dept 2002]).

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 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 and the complaint is dismissed.

Dated: MAR 0 5 2007

J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION