

Edwardsen v 70-A Transp. Inc.

2007 NY Slip Op 30185(U)

March 1, 2007

Supreme Court, Suffolk County

Docket Number: 0025707

Judge: Peter Fox Cohalan

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SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART XXIV - SUFFOLK COUNTY

PRESENT:

Hon. PETER FOX COHALAN

-----x
STARR EDWARDSSEN,

Plaintiff,

-against-

70-A TRANSPORT INC. and BRIANNE TYSON,

Defendants.
-----x

CALENDAR DATE: January 17, 2007
MNEMONIC: MG; C/Disp.

PLTF'S/PET'S ATTORNEY:

SIBEN & SIBEN
90 E. Main St.
Bay Shore, NY 11706

DEFT'S/RESP ATTORNEY:

BAKER McEVOY MORRISSEY & MOSKOVITS
330 W. 34th St.
New York, NY 10001

Upon the following papers numbered 1 to 18 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 11-15 _____; Replying Affidavits and supporting papers 16-18 _____; Other _____; and after hearing counsel in support of and opposed to the motion it is,

ORDERED that this motion by the defendants 70-A Transport Inc. and Brianne Tyson for summary judgment and dismissal of plaintiff Starr Edwardsen's complaint pursuant to CPLR §3212 and Insurance Law §5102 and 5104 as that the plaintiff has not sustained a "serious physical injury" as such term is defined in Insurance Law §5102(d) is hereby granted in its entirety and the plaintiff's action is dismissed.

This action was instituted by the plaintiff for alleged personal injuries sustained in a motor vehicle accident occurring on January 27, 2003 at approximately 12:21 a.m. on Barton Avenue at or near its intersection with Valley Road in Patchogue, Suffolk County on Long Island, New York. The plaintiff alleges that the defendant 70-A Transport Inc.'s taxi, being driven by Brianne Tyson (hereinafter Tyson), attempted to make a left turn from Barton Avenue, eastbound, onto Valley Road without signaling and came into contact with the plaintiff's vehicle which was proceeding straight on Barton Avenue in a westerly direction. The plaintiff claims she hit the steering wheel and was bleeding from her left knee. This lawsuit thereafter ensued.

The defendants now move for summary judgment pursuant to CPLR §3212 dismissing the plaintiff's complaint on the grounds that the plaintiff has not sustained a "serious physical injury" as that term is defined in Insurance Law §5102(d). The defendants submit medical proof to substantiate their claim that the plaintiff failed to sustain a "serious injury" in the accident. The plaintiff opposes the requested relief in an attorney's affirmation and submission of the plaintiff's deposition but proffers no medical proof to substantiate the claim of a "serious physical injury".

For the following reasons, the defendants' motion for summary judgment pursuant to CPLR §3212 and Insurance Law §5102 and 5104 on the ground that the plaintiff has not sustained a "serious physical injury" as such term is defined in Insurance Law §5102(d) is hereby granted in its entirety and the plaintiff's action is dismissed.

The function of the court on a motion for summary judgment is issue finding not issue determination. It is a most drastic remedy which should not be granted where there is any doubt as to the existence of a triable issue or where the issue is even arguable. Elzer v. Nassau County, 111 AD2d 212, 489 NYS2d 246 (2nd Dept. 1985); Steven v. Parker, 99 AD2d 649, 472 NYS2d 225 (2nd Dept. 1984); Gaeta v. New York News, Inc., 95 AD2d 325, 466 NYS2d 321 (1st Dept. 1983). As the New York Court of Appeals noted in Sillman v. Twentieth Century Fox, 3 NY2d 395, 404 (1957):

"To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (DiMenna & Sons v. City of New York, 301 NY 118.). This drastic remedy should not be granted where there is any doubt as to the existence of such issues (Braun v. Carey, 280 App. Div. 1019), or where the issue is 'arguable' (Barnett v. Jacobs, 255 NY 520, 522); 'issue finding, rather than issue determination is the key to the procedure' (Esteve v. Avad, 271 App. Div. 725, 727)."

Although the question of the existence of a "serious injury" is often left to the jury, where properly raised, the issue of whether a plaintiff is barred from recovery in a judicial forum for want of a "serious injury" is, in the first instance, for the Court's determination. Zoldas v. Louis Cab Corp., 108 AD2d 378, 489 NYS2d 468 (1st Dept. 1985); Dwyer v. Tracy, 105 AD2d 476, 480 NYS2d 781 (3rd Dept. 1984). If it can be said, as a matter of law, that plaintiff suffered no serious injury within the meaning of the Insurance Law, then plaintiff has no claim to assert and there is nothing for the jury to decide. Licari v. Elliott, 57 NY2d 230, 455 NYS2d 570 (1982).

Section 5104 of the Insurance Law provides that an individual injured in an automobile accident may bring a negligence cause of action only upon a showing that the individual has incurred a "serious injury" within the meaning of the no-fault law. Insurance Law §5102(d) defines "serious injury" as a personal injury which results in death; dismemberment, significant disfigurement and 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 can establish that a plaintiff's injuries are not serious within the meaning of Insurance Law §5102 (d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and concluded that no objective medical findings support the plaintiff's claim. **Turchuk v. Town of Walkill**, 55 AD2d 576, 681 NYS2d 72 (2nd Dept. 1998). With this established, the burden shifts to the plaintiff to come forward with admissible evidence to overcome the defendants' submissions by demonstrating a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law. **Gaddy v. Eyster**, 79 NY2d 955, 582 NYS2d 990 (1992). In this situation, the plaintiff must present objective medical evidence of the injury based upon a recent examination of the plaintiff. **Grossman v. Wright**, 268 AD2d 79, 707 NYS2d 233 (2nd Dept. 2000). However, the plaintiff does not provide any medical documentation even though confronted by the defendants with three medical experts attesting to their examination of the plaintiff and their findings that plaintiff suffers from no significant limitation of use of a body function or system or permanent consequential limitation of movement or use of a body member.

Furthermore, the New York Court of Appeals has stated in **Toure v. Avis Rent A Car**, 98 NY2d 345, 746 NYS2d 865 (2002) that a sufficiently described opinion by a doctor on the "qualitative nature of the plaintiff's limitations based upon the normal function, purpose and use" of that body part is sufficient even without specific degrees of limitation or an arbitrary cutoff of degree. However, the Court of Appeals in **Toure** went on to state that a diagnosis of a bulging or herniated disc, by itself, does not constitute a serious physical injury and the plaintiff must provide **objective** evidence of the extent and degree of any alleged physical limitation resulting from the spinal injuries, the duration and causality to any limitation of motion. See, **Howell v. Reupke**, 16 AD3rd 377, 790 NYS2d 703 (2nd Dept. 2005); **Guzman v. Paul Michael Management**, 266 AD2d 508, 698 NYS2d 719 (2nd Dept. 1999).

Generally a soft tissue injury with cervical and low back sprain does not meet the threshold for serious injury (**DeFelippo v. White**, 101 AD2d 801, 475 NYS2d 141). These were the types of injuries which the legislature hoped would no longer burden the court system under the no-fault scheme (**Scheer v. Koubek**, 70 NYS2d 678, 518 NYS2d 788). Neither are subjective complaints of transitory pain due to cervical and lumbar sprains sufficient (**Georgia v. Ramautar**, 180 AD2d 713, 579 NYS2d 743). Here, in the case at bar, the defendants present the affirmation of Wendy Cohn, M.D. who conducted a neurological medical examination and found no neurological disability and normal range of motion tests; an orthopedic medical evaluation of the plaintiff by Patrick Dineen, M.D. who found no permanent or residual injuries and who found no limitations of movements on the tests conducted and set forth in his medical report; and an affirmed radiological medical examination by Roger Berg, M.D. who found normal spinal alignment and no injury causally related to the accident of January 27, 2003. The Court finds that the defendants have met their burden of proof by the reports and affirmations of the medical authorities submitted on this motion.

At that point, supported by objective testing, it was incumbent upon the plaintiff to produce competent medical testimony and evidence showing that she sustained a serious physical injury. Plaintiff has failed to so assemble any competent medical proof to refute the defendants' medical findings of no serious injury. The plaintiff has failed to substantiate a permanent or serious physical injury with an objective test or finding. See, *Marshall v. Albano*, 182 AD2d 614, 582 NYS2d 220 (2nd Dept. 1992); *Castaldo v. Migliore*, 291 AD2d 526, 737 NYS2d 862 (2nd Dept. 2002). The proof adduced by the plaintiff relies upon unsupported conclusions by the plaintiff's attorney in his affirmation and the plaintiff's deposition testimony.

Plaintiff's conclusory statements of undifferentiated pain and discomfort and range of motion restrictions, standing alone, without objective testing results or degrees of limitation is fatal to her complaint. She fails to raise a factual issue requiring a denial of the defendants' motion. See, *Burke v. Torres*, 8 AD3rd 118, 778 NYS2d 486 (1st Dept. 2004); *Mohammed v. Gonzalez*, 1 AD3rd 328, 766 NYS2d 572 (2nd Dept. 2003).

The New York Court of Appeals in *Pommells v. Perez*, NY2d.... in its most recent pronouncement again dealing with serious physical injury and the *Toure* decision, *supra*, noted that:

“ In all three cases we decide today, as in *Toure*, plaintiffs claim to have suffered soft-tissue injuries—herniated discs—caused by car accidents, challenging us once again to articulate criteria that will enable serious injury claims to proceed yet prevent abuses that clog the courts and harm the public. We conclude that, even where there is objective medical proof, when additional contributory factors interrupt the chain of causation between the accident and claimed injury—such as **a gap in treatment**, an intervening medical problem or pre-existing condition—summary dismissal of the complaint may be appropriate.” (emphasis added)

Here, in the case at bar, the Court is confronted with soft tissue injuries and subjective complaints of pain by the plaintiff in conclusory fashion only. The defendants detail the medical reports by the defendants' doctors suggesting no restrictions of movement or range of motion or any other pathology to support an injury. Clearly, the failure to submit some medical authority to support the plaintiff's subjective complaints of pain is fatal to her opposition to the defendants' motion and supports summary disposition and dismissal of the action.

Accordingly, under the facts and circumstances as presented in this case and

after reviewing the deposition of plaintiff and the defendant Tyson, all the medical exhibits submitted in support of the motion and none being offered in opposition thereto, the Court concludes that the plaintiff has failed, as a matter of law, to establish the threshold of sustaining a serious physical injury or any causal relationship with the motor vehicle accident occurring on January 27, 2003. A review of the medical submissions has failed to raise a triable issue of fact that the plaintiff sustained a serious physical injury and therefore the defendants' motion for summary judgment and dismissal of the plaintiff's action pursuant to CPLR §3212 is hereby granted and the plaintiff's action is dismissed.

As the Court noted in Andre v. Pomeroy, 36 NY2d 131, 362 NYS2d 131, 133 (1974):

"[1-3] Summary judgment is designed to expedite all civil cases by eliminating from the trial calendar claims which can properly be resolved as a matter of law. Since it deprives the litigant of his day in court it is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues (Millerton Agway Co-op v. Briar-cliff Farms, 17 N.Y.2d 67, 268 N.Y.S.2d 18, 215 N.E.2d 341). But when there is no genuine issue to be resolved at trial, the case should be summarily decided and an unfounded reluctance to employ the remedy will only serve to swell the Trial Calendar and thus deny to other litigants the right to have their claims promptly adjudicated.

Defendants' motion for summary judgment and dismissal of the plaintiff's action is granted and the plaintiff's action is dismissed.

The foregoing constitutes the decision of the Court.

Dated: March 1, 2007



J.S.C.