

Cole v DL Peterson Trust

2007 NY Slip Op 30403(U)

March 26, 2007

Supreme Court, Kings County

Docket Number: 0018754

Judge: Gloria M. Dabiri

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At an IAS Term, Part 39 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 26th day of March 2007.

P R E S E N T:

HON. GLORIA M. DABIRI,

Justice.

-----X

LISA COLE,

Plaintiff(s),

- against -

Index No.: 18754/04

DL PETERSON TRUST and JOSEPH ISIDORE,

Defendant(s).

-----X

The following papers numbered 1 to 11 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	1, 3, 4, 5 _____
Opposing Affidavits (Affirmations) _____	6 - 10 _____
Reply Affidavits (Affirmations) _____	11 _____
_____ Affidavit (Affirmation) _____	_____
Other Papers <u>Plaintiff's deposition transcript</u> _____	2 _____

Upon the forgoing papers¹, in this action by plaintiff Lisa Cole (Cole) to recover damages for personal injuries sustained in a motor vehicle accident, defendants DL Peterson Trust and Joseph Isidore seek dismissal of the complaint (CPLR 3212) on the ground that

¹ The plaintiff's sur-reply affirmation was not timely received by the court, as requested, and therefore is not considered on the instant motion.

Cole did not sustain a “serious injury” (Insurance Law 5102, 5104) in the accident.

It is alleged that the accident occurred on September 23, 2002, when a vehicle operated by the plaintiff, and owned by non-party Edward Cole, collided with a vehicle owned by DL Peterson and operated by Isidore. The collision occurred in the vicinity of the intersection of the west bound lanes of the Southern State Parkway and Corona Avenue in the Town of Hempstead, Nassau County.

Plaintiff asserts, in her verified Bill of Particulars, that as a result of the accident she sustained multiple injuries including but not limited to: L3-L4 through L5-S1 posterior disc bulges; transitional lower intervertebral disc termed S1-2; lumber spine myofascitis; lumbosacral spine diminished range of motion; thoracic spine myofascitis; bilateral lower cervical paraspinal tenderness on deep palpation with moderate spasm of the cervical spine; persistent posterior neck pain; post traumatic headaches; increased anxiety; and insomnia.

The defendants have the initial burden of establishing that the plaintiff did not suffer a serious injury, as defined by Insurance Law Section 5102[d], as a result of the subject accident, (*see e.g. Gaddy v Eyler*, 79 NY2d 955 [1992]; *Gonzalez v Green*, 24 AD3d 939 [2005]). Once the defendants have made a *prima facie* showing, the burden shifts to the plaintiff to “come forward with admissible proof to raise a triable issue of fact” (*Napoli v Cunningham*, 273 AD2d 366 [2000]).

The defendants, in support of their motion, submit *inter alia*: (1) the sworn deposition testimony of the plaintiff; (2) the sworn report of Dr. Michael Katz, orthopedic surgeon; (3)

the sworn report of Dr. Anthony Maniscalco, neurologist; and (4) the sworn report of Drs. Jane and Joseph Tuvia, radiologists. Dr. Katz, examined the plaintiff on September 15, 2005 and swears to the truth and accuracy of his report “under penalties of perjury”, in compliance with CPLR 2106. The plaintiff provided Dr. Katz with a medical history which referenced a subsequent motor vehicle accident in October 2003. Plaintiff indicated that, at that time, her car was hit in the front, but offered no further information. Dr. Katz quantifies his range of motion findings in the cervical spine and lumbosacral spine and compares them to what is normal. In the cervical spine, he found flexion present to 50 degrees (normal 50 degrees) and extension present to 60 degrees (normal 60 degrees). Lateral rotation was present with right-side rotation to 45 degrees (normal 45 degrees) and left-sided rotation to 45degrees (normal 45 degrees). Adson’s test was negative in the cervical spine. Dr. Katz opined that with regard to the lumbosacral spine, plaintiff’s gait was normal without antalgic or Trendelenburg component and no paravertebral muscle spasm was present. Active range of motion revealed forward flexion to 90 degrees (normal 90 degrees), full extension to 30 degrees (normal 30 degrees), and full lateral and side bending to 30 degrees (normal 30 degrees). Straight leg raising test was negative. Babinski was negative, there was no demonstrable clonus and Patrick was negative. Dr. Katz diagnosed the plaintiff with cervical and lumbosacral strains, resolved. He found no signs or symptoms of permanency, on a causally related basis, relative to the musculoskeletal system. Dr. Katz indicated that Cole was not disabled and capable of gainful employment.

Dr. Maniscalco, performed an examination of the plaintiff on October 14, 2005. The plaintiff complained to Dr. Maniscalco of lower back pain, once or twice a week, which was relieved by taking Motrin. Dr. Maniscalco opined that the plaintiff had a normal neurological examination and exhibited no neurological disability.

Drs. Jane and Joseph Tuvia reviewed the MRI study of the plaintiff's lumbar spine, dated October 7, 2002, reviewed additional file material and provided a report which was sworn to under the penalty of perjury in compliance with CPLR 2106. Drs. Tuvia observed that the lumbar vertebra were normally aligned, with no fracture or dislocation. They found indications of disc desiccation and degeneration. They found no spinal stenosis, no disc bulges or herniations. Drs. Tuvias opined that the plaintiff had minimal degenerative changes of the lower lumbar spine and no findings to suggest trauma or sequella of such. Based upon the forgoing, the defendants have established that the plaintiff did not suffer a serious injury.

The plaintiff in opposition to defendants' motion for summary judgment submits: (1) an unsworn report of the MRI study of the plaintiff's lumbar spine which reported a transitional lower intervertebral disc termed S1/2 and L3/4 through L5/S1 posterior disc bulges; (2) an uncertified copy of the EMG report; (3) the affidavit of Cole; and (4) the sworn neurological report of Dr. R.C. Krishna, who examined the plaintiff on November 1, 2006.

The plaintiff has failed to identify a triable issue of fact. The plaintiff may not rely

upon the unsworn MRI report to overcome the defendant's *prima facie* showing (*Grasso v Angerami*, 79 NY2d 813, 814 [1991]). A defendant may submit unsworn medical reports of the injured plaintiff's physicians in support of its motion for summary judgment, however in doing so the defendant opens the door for the plaintiff to rely upon these unsworn or unaffirmed reports (*Kearse v NY City Transit Auth.*, 16 AD3d 45, 47, FN1 [2005]). In this case, the defendants do not submit the plaintiff's unsworn MRI report in support of their motion. While the defendants' experts, Dr. Michael Katz and Dr. Anthony Maniscalco, reviewed the unsworn October 8, 2002 MRI report, neither doctor indicates that he relied upon the report in forming his conclusion (*Hernandez v Almanzar*, 32 AD3d 360, 361 [2006]; *Kearse*, 16 AD3d at 47, FN1). It has not been sufficiently shown that the defendants opened the door for plaintiff's use of the unsworn report in her opposition to the motion (*Zarate v McDonald*, 31 AD3d 632, 633 [2006]).

Were this court to consider the unsworn MRI report in opposition to the defendant's motion for summary judgment, it is clear that "proof of a herniated [or bulging] disc, without additional objective medical evidence establishing that the accident resulted in significant physical limitations, is not alone sufficient to establish a serious injury" (*Pommells v Perez*, 4 NY3d 566, 574 [2005]; *Navedo v Jamie* 32 AD3d 788, 790 [2006]). The plaintiff has failed to submit any medical proof, contemporaneous with the accident, showing any initial range of motion restrictions to her spine (*Yeung v Rojas*, 18 AD3d 863 [2005]; *Ifrach v Neiman*, 306 AD2d 380, 380-381 [2003]). The examination by Dr. R.C. Krishna, which

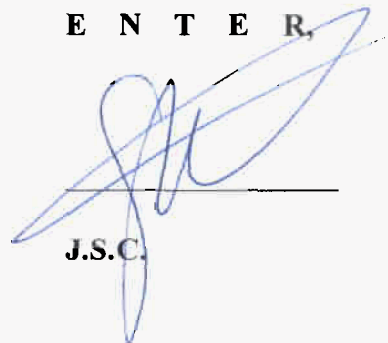
states the plaintiff suffered a restriction in range of motion in her cervical and lumbosacral spine regions, was conducted more than four years after the date of the accident. Moreover, the fact that Dr. Krishna does not address the subsequent motor vehicle accident, which plaintiff disclosed to Dr. Katz, renders Dr. Krishna's opinion, that Cole's injuries are causally related to the September 23, 2002 accident, speculative (*Narducci v McRae*, 298 AD2d 443, 444 [2002]; *Kallicharan v Sooknanan*, 282 AD2d 573, 574 [2001]).

Thus, plaintiff provides no competent medical evidence to support her claim that she was unable to perform substantially all of her daily activities for not less than 90 of the 180 days immediately following the accident as a result of the subject accident (*Kearse*, 16 AD3d 45, 52). In her sworn affirmation, Cole asserts that as a result of injuries suffered in the accident, she was unable for at least the first four months following the accident, to perform normal activities, such as sitting for long periods of time or bending at the waist. In her sworn deposition testimony, Cole stated that she was out of work for two months following the accident. The plaintiff stated that when she returned to work she was on limited duty for the next six months, due to a doctor's order. Although there is an inference from the plaintiff's deposition testimony that her two month absence from work and later limited duty was medically determined, this statement is inadmissible hearsay and "[s]uch conclusory, self-serving allegations are entitled to little weight, and are certainly insufficient to raise a triable issue of fact (*Zoldas v Louise Cab Corp.*, 108 AD2d 378, 383 [1985]; *see also Malloy v Brisco*, 183 AD2d 704, 705 [1992]). By the plaintiff's own admission, she was curtailed

from working for only two months. Accordingly, it is

ORDERED, that the motion is granted and the complaint is dismissed.

E N T E R,

A handwritten signature in blue ink is written over a horizontal line. The signature is stylized and appears to be the initials 'J.S.C.'.

J.S.C.