Calder v Kozerski

2007 NY Slip Op 30879(U)

April 10, 2007

Supreme Court, Suffolk County

Docket Number: 0027980/2003

Judge: Robert W. Doyle

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SHORT FORM ORDER

INDEX No. 03-27980
CAL. No. 06-02244-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 11-14-06
ADJ. DATE 1-19-07
Mot. Seq. # 001- MG; CASEDISP

---X
ESTHER CALDER,

Plaintiff,

- against -

ERIC E. KOZERSKI and ERIC G. KOZERSKI,

Defendants.
---X

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Upon the following papers numbered 1 to 19 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 11-16; Replying Affidavits and supporting papers 17-19; 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 in the parking lot at 1000 Route 27A, Babylon, New York on December 9, 2000. The accident allegedly happened when the vehicle owned by defendant Eric G. Kozerski and operated by defendant Eric E. Kozerski impacted the vehicle operated by non-party George Ruiz, and in which the plaintiff was riding as a passenger. Defendants now move 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 defendants have 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 this motion, defendants submit, inter alia, the pleadings, plaintiff's verified bill of particulars; plaintiff's Good Samaritan Hospital Medical Center emergency room records; the unsworn report of plaintiff's treating physician, Anne Brutus, M.D.; the two unsworn reports of plaintiff's radiologist, Robert D. Solomon; the unsworn report of plaintiff's other treating physician, Arthur M. Thompson, M.D.; the affirmed report of defendants' examining radiologist, Steven L. Mendelsohn, M.D.; the affirmed report of defendants' examining orthopedist, Arthur M. Bernhang, M.D.; and the plaintiff's deposition testimony.

In her bill of particulars, plaintiff claims that she sustained displacement of a cervical disc; thoracic sprain/strain; a lumbar derangement with narrowing of the L5-S1 disc space; right shoulder "grade I separation" with impingement/rotator cuff tendinitis; a partial ACL tear of the right knee; and a TMJ joint dysfunction. Plaintiff also claims that she was confined to her bed/home for three months and that she was incapacitated from her employment for three months. In addition, plaintiff claims that she sustained a serious injury in the categories of a significant disfigurement, a permanent loss of use, a permanent consequential limitation, a significant limitation, and a non-permanent injury.

Plaintiff's Good Samaritan Hospital Medical Center emergency room records on the day of the accident show that she complained of pain in her right shoulder and head. A physical examination of the plaintiff by hospital staff show that she was alert and not distressed. These records also show that she had a full range of motion of the neck and no neurological deficits. Her final diagnosis was "mild

shoulder pain." Plaintiff was then released that day with instructions to take over-the-counter medicine for pain and to get about two days of bed rest.

In her report dated December 12, 2000, Dr. Brutus states that she performed a medical examination of the plaintiff on that day, and her findings include DTRs that were bilaterally "2+"; a normal gait; medial joint line tenderness of the right knee; and glenohumeral joint tenderness of the right shoulder. Her range of motion testing of the plaintiff's cervical spine showed that flexion, extension, right/left rotation and left/right lateral bending were 35, 35, 60/60 and 30/30 degrees, compared with the normal ranges of 45, 45, 70/70 and 40/40 degrees. Dr. Brutus opined that plaintiff had sustained a displacement of a cervical disc, a thoracic spine sprain/strain, a right rotator cuff syndrome and derangements of the lumbar spine and right knee.

In his report dated December 12, 2000, Dr. Thompson states that he performed a medical examination of the plaintiff on that day, and his findings include grossly intact cranial nerves; a supple neck with a symmetrical range of motion; mild tenderness over the right shoulder; and a bruise over the right knee. Dr. Thompson opined that plaintiff had sustained a right shoulder "grade I separation" with a minor impingement.

In his report dated January 8, 2001, Dr. Solomon states that he performed MRI studies of the plaintiff's cervical spine on that date, and his findings include no disc bulges or herniations; no fractures; and symmetrical facet joints. He opined that there was no pathology of the soft tissues or focal bony structures. In his other MRI report dated January 15, 2001, Dr. Solomon states that he performed MRI studies of the plaintiff's lumbar spine on that date, and his findings include no disc bulges or herniations; symmetrical facet joints; patent neural canals; and a maintained lordosis. Dr. Solomon opined that there was no pathology of the soft tissues or focal bony structures.

In his report dated September 21, 2004, Dr. Mendelsohn states that he performed an independent radiological examination of the MRI studies of the plaintiff's right knee dated March 8, 2001, and his findings include well-visualized menisci with no fraying or degeneration, and no meniscal tears. He also noted that the ligaments and tendons of plaintiff's right knee were intact and that there was no joint effusion. Dr. Mendelsohn opined that these studies showed a normal right knee.

In his report dated May 31, 2006, Dr. Bernhang states that he performed an independent orthopedic examination of the plaintiff on that day, and his findings include a negative Spurling's test for cervical radiculopathy; a negative Hawkin's test for shoulder impingement; and a straight leg raising test that was 75/75 degrees, with normal range of motion being 55 degrees and above. He also observed that there was no scarring or bruising about the knees, and that there was no palpable trigger points or spasm in thoracolumbnar spine area. Additionally, he noted that plaintiff's cervical flexion, extension, lateral flexion, and cervical flexion were 35, 45, 40/35 and 55/55 degrees, with the normal range being 38, 38, 43/43 and 45/45 degrees. He further noted that plaintiff's knee extension and flexion were 0/0 and 125/125, with the normal range being 0/0 and 134/134 degrees. Moreover, he observed that shoulder abduction, forward flexion, external rotation and internal rotation were 170/170, 160/160, 90/90 and 75/75 degrees, with the normal range being 170, 158, 90 and 70 degrees. Dr. Bernhang opined that any injuries that plaintiff may have suffered from the subject accident, or from a reported subsequent

accident in December 2004, had resolved without residuals and that she was not disabled.

Plaintiff testified that she was confined to her bed for the first two or three days after the accident. She was also confined to her home for a couple of weeks. Plaintiff did not return to work immediately after the accident because she had been waiting for another work assignment and because her prior attorney had advised her to remain out of work for three months. She treated at Brentwood Pain and Rehab for injuries to her right shoulder and knee five days per week for a few months. She also had an impression of her teeth taken and wore a fitted mouthpiece for about one month. The last time she could recall having any medical treatment for her injuries was sometime in 2001. Plaintiff further testified that she is no longer able to play with her children because she gets shoulder pain, however, she is currently employed on a full time basis as a bus maid.

By their submissions, defendants 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]; ***Edwards v DeHaven***, 155 AD2d 757, 547 NYS2d 462 [3d Dept 1989]). While defendants' examining orthopedist noted some limitations in plaintiff's cervical ranges of motion and in her range of knee flexion, the remainder of his testing was negative for cervical radiculopathy, lower back problems and shoulder impingement. He also found that plaintiff had a full range of shoulder motion as well as no palpable spasm about the thoracic spine. Noting that there were no residuals from the accident or from plaintiff's subsequent December 2004 accident, he concluded that she was not disabled. Additionally, defendants' examining radiologist concluded that plaintiff's MRI studies of the right knee showed no meniscal tears or joint effusion. The defendants' remaining evidence, including the plaintiff's own deposition testimony and medical records, also show that she did not sustain a serious injury. As defendants have met their burden as to all categories of serious injury alleged, the Court turns to plaintiffs' 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 affirmed report of Dr. Brutus, and the affirmed report of her other treating physician, Dr. Daniel Korman, M.D. In her report dated April 9, 2001, Dr. Brutus states that she examined the plaintiff on that date, and her findings include a normal gait with antalgic posturing, and palpable right upper trapezius trigger points. She also observed that there was glenohumeral joint tenderness with a full active range of motion of the right shoulder and a tender area of the medial joint line of the right knee. Dr. Brutus opined that plaintiff had sustained, inter alia, a right knee derangement and a thoracic spine sprain/strain.

In his report dated October 30, 2006, Dr. Korman states that he examined the plaintiff on that date, and his findings include right upper and lower body muscle strength that was "4/5"; a positive foraminal compression test for the cervical spine; and a positive impingement test for the right shoulder. His other testing also showed deficits in cervical, thoracic and lumbar spinal ranges of motion, as well as deficits in plaintiff's right shoulder and right knee ranges of motion. Dr. Korman opined that plaintiff had sustained injuries to her right shoulder and right knee, as well as cervical, thoracic and lumbar spine nerve root injuries, all of which were causally related to the accident. He also concluded that plaintiff's

prognosis was guarded and that she was in need of additional medical care to manage her pain and maintain function.

In her personal affidavit, plaintiff avers that she is in constant pain and has difficulty caring for her children, bending, and lifting even moderate weight objects. She also avers that she has been unable to attain further treatment because she is a single mother and the sole provider for her children.

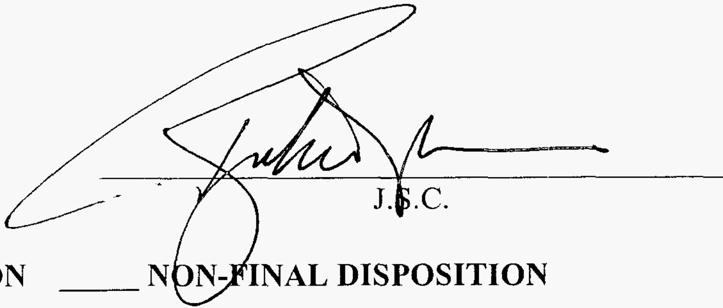
Plaintiff has provided insufficient medical proof to raise an issue of fact that she sustained a serious injury under the no-fault law (*see*, ***Burke v Galli***, 242 AD2d 595, 664 NYS2d 742 [2d Dept 1997], *lv denied* 91 NY2d 806, 669 NYS2d 1 [1998]; ***Picott v Lewis***, 26 AD3d 319, 809 NYS2d 541 [2d Dept 2006]). Initially, it is noted that plaintiff failed to submit any medical proof addressing her prior and subsequent accidents or her condition relative to these accidents (*see*, ***Luckey v Bauch***, 17 AD3d 411, 792 NYS2d 624 [2d Dept 2005]; ***Grant v Fofana***, 10 AD3d 446, 781 NYS2d 160 [2d Dept 2004]). Also, the report of Dr. Brutus, that is based upon an examination of plaintiff conducted more than five years ago, is without probative value as to the categories of a permanent loss of use, a permanent consequential limitation, or a significant limitation (*see*, ***Burgos v Vargas***, 33 AD3d 579, 822 NYS2d 297 [2d Dept 2006]; ***Cerisier v Thibiu***, 29 AD3d 507, 815 NYS2d 140 [2d Dept 2006]). While Dr. Korman states that he observed range of motion limitations in plaintiff's spine and other body parts, he does not indicate what objective tests were performed to measure these limitations (*see*, ***Jiminez v Kambali***, 272 AD2d 581, 708 NYS2d 460 [2d Dept 2000]; ***Kauderer v Penta***, 261 AD2d 365, 689 NYS1d 190 [2d Dept 1999]). Further, Dr. Korman's diagnoses of cervical, thoracic and lumbar spine nerve root injuries, rotator cuff impingement and spinal myofascitis are not explained, defined or specifically connected to plaintiff's limitations, and their significance is not sufficiently delineated (*see*, ***Clements v Lasher***, 15 AD3d 712, 788 NYS2d 707 [3d Dept 2005]; ***Davis v Evan***, 304 AD2d 1023, 758 NYS2d 203 [3d Dept 2003]). Additionally, Dr. Korman failed to offer objective medical proof showing a significant impairment with respect to the function of plaintiff's right knee and right shoulder (*see*, ***Chan v Casiano***, __AD3d __, 828 NYS2d 173 [2d Dept 2007]). In any event, plaintiff's five-year gap in treatment was, in essence, a cessation of treatment which is not satisfactorily explained either by Dr. Korman's report or by plaintiff's other submissions (*see*, ***Bycinthe v Kombos***, 29 AD3d 845, 815 NYS2d 693 [2d Dept 2006]; ***Pimentel v Mesa***, 28 AD3d 629, 813 NYS2d 517 [2d Dept 2006]; ***Karabchievsky v Crowder***, 24 AD3d 614, 808 NYS2d 338 [2d 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*, ***Felix v New York City Transit Auth.***, 32 AD3d 527, 819 NYS2d 835 [2d Dept 2006]; ***Moore v Sarwar***, 29 AD3d 752, 816 NYS2d 503 [2d Dept 2006]). 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*, ***Magarin v Kropf***, 24 AD3d 733, 807 NYS2d 398 [2d Dept 2005]; ***Drexler v Melanson***, 301 AD2d 916, 754 NYS2d 433 [3d Dept 2003]). Plaintiff's affidavit did not adequately specify her "usual and customary daily activities" before the accident, or which of those activities she was unable to perform after the accident (*see*, ***Keena v Trappen***, 294 AD2d 405, 742 NYS2d 344 [2d Dept 2002]). Furthermore, plaintiff admitted during her examination before trial that her unemployment after the accident was voluntary

and/or due to scheduling issues unrelated to her condition (*see*, ***Omar v Goodman***, 295 AD2d 413, 743 NYS2d 568 [2d Dept 2002]). In any event, plaintiff did not submit a physician's affidavit substantiating the existence of a medically determined injury producing the alleged impairment of her activities (*see*, ***Vishnevsky v Glassberg***, 29 AD3d 680, 815 NYS2d 152 [2d Dept 2006]).

Moreover, 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, the defendants' motion for summary judgment is granted and the complaint is dismissed.

Dated: APR 10 2007



J.S.C.

__X__ **FINAL DISPOSITION** _____ **NON-FINAL DISPOSITION**