Blume v Krausz
2007 NY Slip Op 30897(U)
March 29, 2007
Supreme Court, Suffolk County
Docket Number: 0010198/2004
Judge: Robert W. Doyle
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

INDEX No. 04-10198

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

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 11-20-06
ADJ. DATE 1-11-07
Mot. Seq. # 002 – SJ – casedisp

---X
DANIELLE S. BLUME,

Plaintiff,

- against -

LILLIAN M. KRAUSZ,

Defendant.
---X

PLAINTIFF'S ATTORNEYS:
LAW OFFICES OF
MAZZEI & BLAIR, ESQS.
9B Montauk Highway
Blue Point, New York 11715

DEFENDANT'S ATTORNEYS
JAMES P. NUNEMAKER, JR. &
ASSOCIATES
P.O. Box 9347
Uniondale, New York 11553-9347

Upon the following papers numbered 1 to 4 read on this motion for summary judgment; Notice of Motion/ ~~Order to Show Cause~~ and supporting papers 1; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 2; Replying Affidavits and supporting papers 3; Other 4; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendant for an order granting her summary judgment dismissing plaintiff's complaint upon the ground that plaintiff has not suffered a serious injury as that term is defined in the Insurance Law is considered by the Court and is determined as follows:

This is an action commenced by plaintiff seeking to recover for injuries allegedly sustained by her in a motor vehicle accident on September 10, 2003 on County Road 83 at or near its intersection with Shaber Street, in the Town of Brookhaven, New York when the vehicle which plaintiff was operating came in contact with a vehicle being operated by defendant. In her bill of particulars, plaintiff alleges, *inter alia*, injuries consisting of contusions and lacerations to her arms, stomach, neck, right hand and left great toe.

Defendant now moves for summary judgment dismissing the complaint of plaintiff herein upon the ground that this plaintiff has not sustained a serious injury. In support of her motion for summary judgment, defendant submits to the Court several affirmed reports from physicians who examined plaintiff on behalf of defendant. S. Farkas, M.D., an orthopedic surgeon, examined plaintiff on March 28, 2006 and concluded that while plaintiff had suffered contusions and

lacerations to her left leg and left great toe, those injuries were resolved. Dr. Farkas examined both of plaintiff's legs and found full range of motion in both knees. He also found that plaintiff's range of motion in her left great toe was full in dorsiflexion and plantarflexion and equal bilaterally. While Dr. Farkas noted that plaintiff complained of less sensation about the plantar surface of the left great toe than in the right great toe, he found no objective evidence of any orthopedic condition.

Defendant also submits the affirmed medical report of Richard A. Pearl, M.D., a neurologist, who also examined plaintiff on defendant's behalf. In this report, Dr. Pearl concludes that plaintiff has no neurological disability as a result of the motor vehicle accident in question. Dr. Pearl sets forth the tests performed in reaching these conclusions and further sets forth range of motion findings concerning plaintiff's cervical and lumbar spine and how those results compare to normal ranges of motion. He also notes that although plaintiff complains of reduced sensation on the bottom of her left great toe, there were no objective findings to indicate any neurological injury or disability.

In opposition to defendant's application, plaintiff submits to the Court an unsworn medical report from Michael Guo, M.D. a neurologist, and an affirmation from Frederic Mendelsohn, M.D., also a neurologist. The report from Dr. Guo, being neither sworn to nor affirmed, is without probative value and cannot be considered by the Court (*see*, Simms v. APA Truck Leasing Corp., 14 AD3d 322, 788 NYS2d 63; Hernandez v. Taub, 19 AD3d 368, 796 NYS2d 169).

Dr. Mendlesohn's affirmation sets forth the basis for the opinion he renders including office records of plaintiff's family physician, office records from North Shore Orthopedic Surgery, the aforementioned report of Dr. Guo, the reports of defendant's physicians and an examination of plaintiff conducted by Dr. Mendlesohn on November 28, 2006. During his examination of plaintiff he notes that he performed a sensory examination of the left great toe of plaintiff utilizing pinprick, light touch and vibration testing. Based upon all of this, he concludes that plaintiff suffered permanent sensory nerve damage to her left great toe and that said injury was caused by the motor vehicle accident of September 10, 2003.

Dr. Mendlesohn's affirmation is insufficient to raise a triable issue of fact on the question of serious injury for several reasons. To begin with, much of Dr. Mendlesohn's conclusion is improperly based upon the unsworn records and reports of other medical providers (*see*, Springer v. Arthurs, 22 AD3d 829, 803 NYS2d 170; Sayas v. Merrick Transportation, 23 AD3d 367, 804 NYS2d 769). While Dr. Mendlesohn did conduct his own examination of plaintiff, he fails to describe the nature of the tests he performed on plaintiff, the results of those tests and how those results compare to normal findings (*see*, Kivlan Acevedo, 17 AD3d 321, 792 NYS2d 573; Munoz v. Hollingsworth, 18 AD3d 278, 795 NYS2d 20). Moreover, even if plaintiff were able to establish a loss of sensation in her left great toe, there is no showing that plaintiff suffered any disability or loss of any function as the result of the loss of sensation over the bottom surface of one of her toes (*see*, Meyer v. Carney, 187 AD2d 931, 590 NYS2d 356).

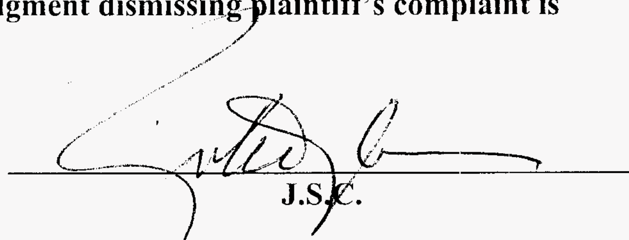
In order to prevail on this type of motion, defendant has the initial burden of establishing that plaintiff did not sustain the type of "serious injury" necessary to satisfy the threshold

requirement of Insurance Law S 5102(d) (*see*, Toure v Avis Rent A Car Sys., 98 NY2d 345 ,746 NYS2d 865; Gaddy v. Eyler, 79 NY2d 955, 956-957, 582 NYS2d 990; Boehm v. Estate of Mack, 255 AD2d 749, 749-750, 680 NYS2d 732). As with all summary judgment motions, defendant was required to come forward with proof, in admissible form, sufficient to justify the Court granting her judgment as a matter of law (*see*, Winegrad v. New York University Medical Center, 64 NY2d 851, 487 NYS2d 316; Zuckerman v. City of New York, 49 NY2d 557, 427 NYS2d 595). In order to sustain this initial burden, defendant produced the aforementioned affirmed independent medical examination reports. This evidence was clearly sufficient to meet defendant's initial burden on the threshold issue of serious injury and required plaintiff to come forward with evidence in admissible form creating a genuine triable issue of fact as to whether plaintiff sustained a serious injury as a result of the accident (*see*, Gaddy v. Eyler, *supra*; Morgan v. Beh, 256 AD2d 752, 681 NYS2d 394; Weaver v. Derr, 242 AD2d 823, 661 NYS2d 684; Rennell v. Horan, 225 AD2d 939, 639 NYS2d 171).

Plaintiff has not met that burden. The affirmation of Dr. Mendlesohn was deficient in the several respects that were noted. The balance of the proof submitted by plaintiff was not in admissible form and therefore, insufficient to meet her burden.

Accordingly, upon the failure of plaintiff to offer admissible proof sufficient to raise a triable issue of fact on the question of whether plaintiff suffered a serious injury, the motion by defendant for an order granting her summary judgment dismissing plaintiff's complaint is granted and the complaint dismissed.

Dated: MARCH 29, 2007



J.S.C.

__X__ FINAL DISPOSITION _____ NON-FINAL DISPOSITION