

Hess v Tropeano

2007 NY Slip Op 31080(U)

April 26, 2007

Supreme Court, Suffolk County

Docket Number: 0014597/2005

Judge: Robert W. Doyle

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

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 1-5-07
ADJ. DATE 2-27-07
Mot. Seq. # 001 - MG; CASEDISP

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NANCY HESS and CHARLES HESS,	:	SIBEN & SIBEN, LLP
	:	Attorneys for Plaintiffs
Plaintiffs,	:	90 East Main Street
	:	Bay Shore, New York 11706
- against -	:	
	:	RUSSO & APOZNANSKI
LESLIE C. TROPEANO,	:	Attorneys for Defendant
	:	875 Merrick Avenue
Defendant.	:	Westbury, New York 11590
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Upon the following papers numbered 1 to 17 read on this motion for summary judgment; Notice of Motion/Order to Show Cause and supporting papers 1 - 9; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 10 - 15; Replying Affidavits and supporting papers 16 - 17; Other _____; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion (#001) by defendant, Leslie C. Tropeano, for summary judgment pursuant to CPLR 3212 dismissing the action on the ground that plaintiff did not sustain a serious injury pursuant to NY Insurance Law §5102(d) is granted.

In this negligence action, plaintiff, Nancy Hess, seeks to recover damages for injuries allegedly sustained in a motor vehicle accident on October 25, 2004. Plaintiff, Charles Hess, asserts a derivative cause of action. Plaintiff alleges that her vehicle was struck by a vehicle owned and operated by defendant, Leslie C. Tropeano on Route 27 at the intersection with Exit 58 in the Town of Brookhaven, New York. Before the court is a motion for summary judgment to dismiss the action by defendant.

In the bill of particulars, plaintiff alleges that she sustained the following injuries: herniated discs at C5/6, L3/4, L4/5 and a disc protrusion at C6/7. In addition plaintiff alleges that she sustained sacroiliac joint dysfunction; cervical spine sprain; lumbosacral spine sprain and headaches. Plaintiff states that she was totally incapacitated from her employment for four days and was confined to home

for three days. The court construes that plaintiff is alleging injuries in the following serious injury categories: permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system.

Under the Insurance Law, “[s]erious injury” means 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” (Insurance Law § 5102 [d]).

In order for plaintiff to prove that she sustained the serious injury category of permanent loss, she must demonstrate that she sustained a total loss of a body organ, member, function or system (*Oberly v Bangs Ambulance Inc.*, 96 NY2d 295, 727 NYS2d 378 [2001]). In the context of the plaintiff's claims, the term “consequential” means important or significant (*Kordana v Pomellito*, 121 AD2d 783, 503 NYS2d 198, 200 [1986], *app dis*, 68 NY2d 848, 508 NYS2d 425 [1986]). The term, “significant”, as it appears in the statute, has been defined as “something more than a minor limitation of use” and the term, “substantially all” has been construed to mean “that the person has been curtailed from performing his usual activities to a great extent rather than some slight curtailment” (*Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]).

On a motion for summary judgment to dismiss a complaint for failure to set forth a prima facie case of serious injury as defined by Insurance Law § 5102 (d), the initial burden is on the defendants “to present evidence, in competent form, showing that plaintiff has no cause of action” (*Rodriguez v Goldstein*, 182 AD2d 396, 397, 582 NYS2d 395, 396 [1992]). Once defendants have met the burden, the plaintiff must then, by competent proof, establish a prima facie case that such serious injury exists (*DeAngelo v Fidel Corp. Services, Inc.*, 171 AD2d 588, 567 NYS2d 454, 455 [1991]). 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 [1992]). The proof must be viewed in a light most favorable to the non-moving party (*Cammarere v Villanova*, 166 AD2d 760, 562 NYS2d 808, 810 [1990]).

In support of the motion, defendant submits, *inter alia*, the pleadings; bill of particulars; and sworn reports by C.M. Sharma, M.D., a neurologist, Anthony Spataro, M.D., an orthopedist and Sondra J. Pfeffer, M.D., a radiologist. Dr. Sharma avers that he examined plaintiff on August 2, 2006 and observed the movements of the neck and spine to be normal with pain on the right side. He also noted that movements of the shoulders were normal. He diagnosed plaintiff as having sustained subjective cervical and lumbar pain with no disability.

Dr. Spataro avers that he examined plaintiff on August 2, 2006 and observed and quantified plaintiff's ranges of motion in the cervical and lumbar spines to be normal as compared to normal ranges. He noted normal range of motion in the right arm. Although he noted that plaintiff could not touch her toes without bending the knees, further objective testing revealed negative findings. He concluded that plaintiff sustained a sprain of the cervical and lumbosacral spines and a contusion to the

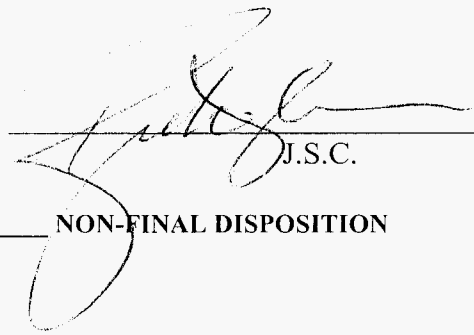
right arm.

Dr. Pfeffer avers that she performed a film review of plaintiff's magnetic resonance imaging "(MRI)" studies of the cervical and lumbar spines. Upon examining the lumbar MRI, she observed mild disc bulging a L2/3 and L15/S1 and also noted disc dessication and chronic disc herniations at L3/4 and L4/5. Upon review of the cervical spine MRI, Dr. Pfeffer noted multi-level disc dessication and bulging. Dr. Pfeffer states that such findings are reflective of long-standing degenerative disc disease processes and can not be attributed to the subject accident. These submissions demonstrate defendant's prima facie entitlement to judgment as a matter of law.

In opposition, plaintiff submits, *inter alia*, plaintiff's affidavit, counsel's affirmation and the sworn reports of the radiologists who performed the cervical MRI and lumbar MRI. Initially, counsel's affirmation and plaintiff's affidavit are rejected by the Court as not probative. These opinions and conclusions are not supported by, corroborated by or referenced to any medical expert. Neither is plaintiff nor her attorney qualified to render medical opinions (*see, Armstrong v Wolfe*, 133 AD2d 957, 520 NYS2d 466 [1987]). Although plaintiff submitted evidence that she suffered from a herniated disc and bulging discs, such injuries do not, in and of themselves, constitute serious injury (*see, Noble v Ackerman*, 252 AD2d 392, 394, 675 NYS2d 86 [1998]; *cf., Puma v Player*, 233 AD2d 308, 649 NYS2d 461 [1996]) Rather, the plaintiff is required "to provide objective evidence of the extent or degree of the alleged physical limitations resulting from the injuries and their duration" (*Noble v Ackerman, supra*, at 394), which she could not do without the submission of a sworn report from a medical expert. It is well settled that a minor, mild or slight limitation of use should be classified as insignificant within the meaning of the statute (*Licari v Elliott, supra*). Lastly, the plaintiff's subjective complaints of pain are insufficient to satisfy the statutory threshold of a serious injury (*see, Scheer v Koubek*, 70 NY2d 678, 679, 518 NYS2d 788 [1987]).

Accordingly, the defendant's motion for summary judgment is granted.

Dated: APR 26 2007



J.S.C.

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