

Roberts v Gregory

2007 NY Slip Op 31295(U)

May 14, 2007

Supreme Court, Suffolk County

Docket Number: 0009304/2003

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 11-9-06
ADJ. DATE 2-7-07
Mot. Seq. # 001 - MD

-----X
ERICA A. ROBERTS, :
 :
 :
 Plaintiff, :
 :
 - against - :
 :
 THOMAS M. GREGORY, :
 :
 :
 Defendant. :
-----X

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Upon the following papers numbered 1 to 26 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 14; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 15 - 24; Replying Affidavits and supporting papers 25 - 26; Other _____; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion (001) by defendant Thomas M. Gregory pursuant to CPLR 3212 and Insurance Law §5102(d) for an order granting summary judgment dismissing the complaint, asserting plaintiff's injuries do not meet the serious injury threshold, opposed by plaintiff Erica A. Roberts, is denied.

This is an action sounding in negligence arising out of an automobile accident which occurred on September 10, 2000 on the eastbound service road, Expressway Drive South, at or near its intersection with Fulton Street and Motor Parkway, Suffolk County, New York. Plaintiff was driving a 1996 Honda Accord, northbound, and was enroute to the Deer Park Baptist Church for Sunday services at 11:30 a.m. (defendant's exhibit E, p.9-10). She had signaled to change from the right lane to the left lane when she was struck in the passenger rear (p.20).

Plaintiff pleaded the following injuries in her verified bill of particulars (defendant's exhibit D): torn meniscus of the right knee; internal derangement of the right knee; medial joint line tenderness of the right knee; positive McMurray's testing of the right knee; right knee contusion; right knee pain with buckling; decreased range of motion of the right knee; posterior disc herniation at L3-4 with flattening of the ventral thecal sac; posterior disc herniation at L4-5 with flattening of the ventral thecal sac; L5-S1 posterior subligamentous disc bulges; right L5 radiculopathy; diminished disc space height at L5-S1; positive EMG testing of the lumbar spine; tenderness over the lower thoracic to lumbosacral paraspinal muscles

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including quadratus lumborum bilaterally; lumbar radiculopathy; lumbar sprain; diminished range of motion of the lumbosacral spine; strain of the lumbar spine; thoracolumbosacral myofascial derangement; thoracolumbosacral sprain with myofascial derangement; thoracolumbosacral strain with myofascial derangement; and cervical strain and sprain.

Defendant claims entitlement to an order granting summary judgment dismissing the complaint, asserting plaintiff did not sustain serious injury sufficient to meet the threshold pursuant to Insurance Law of the State of New York §5102(d). In support of motion (001) defendant has submitted, inter alia, a copy of the summons and complaint; defendant's answer; a copy of the bill of particulars; unsigned copy of the deposition of plaintiff, Erica A Roberts; uncertified copies of health insurance claim forms; sworn letters of defendant's examining physicians: orthopedic surgeon David Koretz, M.D., dated January 18, 2001; orthopedist Jay Nathan, M.D., dated March 6, 2006 and September 21, 2006; and neurologist Richard Pearl, M.D. dated December 28, 2005.

Pursuant to Insurance Law 5102(d), "[s]erious injury" means a personal injury which results in 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."

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 Elliot*, 57 NY2d 230, 455 NYS2d 570 [1982]).

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 "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 (see, *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 Eyley*, 79 NY2d 955, 582 NYS2d 990 [1992]).

The report of Dr. Koretz, dated January 18, 2001 (defendant's exhibit J), indicates examination of plaintiff's cervical spine shows no evidence of tenderness or spasm of the cervical spine; full range of flexion, extension, rotation and lateral bending was present with no complaints of pain; biceps and triceps reflexes were brisk and equal; no motor weakness on flexion and extension of the elbow; pronation and supination of the forearm; dorsi or volar flexion of the wrist; pinch, grasp, abduction or adduction of the fingers; sensation to pinprick and light touch in the upper extremities was normal. Normal cervical lordotic curve is present and no tilting of the cervical spine to the right or left. Examination of the lumbosacral spine reveals claimant complains of tenderness in the right and left paraspinal musculature; full range of flexion, extension, rotation and lateral bending; can walk on heels and toes, squat and get on and off the exam table with no difficulties; knee and ankle jerk reflexes were brisk and equal; no motor weakness on hip flexion, knee extension or anterior tibials; sensation to pinprick and light touch in the lower extremities was normal; when standing erect, there is no evidence of a sciatic tilt. Examination of the right knee revealed no swelling, tenderness was present medially with pain on patellar compression; full flexion and extension of the knee was present; no weakness of the cruciate or collateral ligaments; McMurray's sign is negative, Drawer's sign is negative; she is ambulatory with a normal gait. Dr. Koretz indicated he reviewed the available medical records, but did not indicate what records were made available or the findings on those records. He diagnosed her with a cervical and lumbosacral strain and contusion of the right knee. He found causal connection between the injuries and the accident, assuming the history provided by claimant is accurate and that timely medical records confirm the reported injuries. He did indicate that there was no necessity for household help, medical supplies or transportation, but she did need diagnostic testing, mainly an MRI of the knee with a determination for surgery and physical therapy depending upon the results of the MRI. Follow up care was indicated on an every four week basis for an additional eight weeks. He saw no need for physiotherapy, acupuncture or massage treatments to the cervical and lumbar spines. Based upon the foregoing, it is determined that Dr. Koretz' report was inconclusive with regard to plaintiff's injuries as he did not indicate he reviewed the results of any diagnostic testing, and in fact, recommended diagnostic testing and further treatment to her knee.

Dr. Jay Nathan examined plaintiff on March 6, 2006 (defendant's exhibit I) and states claimant reports she uses a right knee brace and had a subsequent MVA on November 18, 2005 and sustained injuries to her back. His report sets forth that an MRI of the lumbar spine dated November 16, 2000 reports L3-4 and L4-5 posterior disc herniations with flattening of the thecal sac, L5-S1 posterior subligamentous disc bulge; and an x-ray report dated October 16, 2000 reports diminished disc space height at L5-S1. There were no abnormalities of the right knee. He set forth quantified measurements with regard to the range of motion tests performed on plaintiff's upper and lower extremities, knee examination, cervical spine and thoracolumbar spine. His impression was that of cervical sprain; lumbar sprain, pre-existing and exacerbated; right knee sprain; has no disability and may work without restrictions. Prognosis is satisfactory.

An addendum to Dr. Nathan's report merely sets forth that the ranges of motion throughout the examination of Erica Roberts were all within normal limits. There is no degenerative, congenital or age related factors relative to those measurements. Dr. Nathan, however, does not indicate what parts of her body were examined and did not quantify his findings in the addendum report. The report is deemed conclusory at best.

Dr. Pearl performed a neurological examination on plaintiff on December 28, 2005 at the request

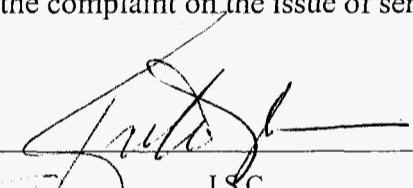
of defendant's attorneys. He indicates she is under no active health care, but did have a prior motor vehicle accident in 1987, and a subsequent accident November 2004 injuring her mid and lower back. He quantified the findings upon physical examination of her cervical and lumbar spine. The remainder of the examination revealed no positive findings except she alleged discomfort on palpation of the paraspinal muscles in the thoracic and lumbar region. Although he reviewed a report of Dr. Brawner dated 11/17/00; report of Dr. Nelson dated 9/28/00; EMG and nerve conduction studies report dated 11/20/00; range of motion testings undated; MRI of the lumbosacral spine dated 11/16/00; x-ray of the lumbosacral spine and right knee, he did not comment on the results, and only opined plaintiff sustained a thoracic and lumbosacral sprain. He also set forth that she alleges difficulty with her right knee, but there are no objective findings to indicate neurological injury, need for neurological healthcare, testing or neurological disability. He further states there are no objective findings to correlate with any alleged findings on testing. He defers discussion of the right knee to appropriate orthopedic consultants.

Based upon review of all defendant's submissions, it is determined that defendant has introduced evidence concerning disc herniations in plaintiff's lumbosacral spine at L4-5 and L5-S1. Disc herniation and limited range of motion based on objective findings may constitute evidence of serious injury (*Jankowsky v Smith*, 294 AD2d 540, 742 NYS2d 876 [2nd Dept 2000]). A disc bulge may constitute a serious injury within the meaning of Insurance Law §5102 (*Hussein et al v Harry Littman et al*, 287 AD2d 543, 731 NYS 2d 477 [2001]). None of defendant's experts have opined as to whether or not the herniated discs diagnosed in plaintiff's lumbosacral spine are related to the accident of September, 2000. There were also no objective findings set forth with regard to plaintiff's claim of injury to her right knee by any of defendant's examining physicians.

Accordingly, it is determined defendant has not met the burden of coming forward with evidence in admissible form sufficient to demonstrate prima facie entitlement to an order granting summary judgment on the issue that plaintiff did not sustain serious injury within the parameters set forth in Insurance Law §5102(d).

Accordingly, defendant's motion (001) seeking dismissal of the complaint on the issue of serious injury is denied in its entirety.

Dated: MAY 14 2007



J.S.C.

 FINAL DISPOSITION NON-FINAL DISPOSITION