

Khundy v Hugel

2007 NY Slip Op 31300(U)

May 14, 2007

Supreme Court, Suffolk County

Docket Number: 0023001/2004

Judge: Robert W. Doyle

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

P R E S E N T :

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 11-21-06
ADJ. DATE 1-16-07
Mot. Seq. # 002- MD

-----X
LAMYA KHUNDY, :
 :
 :
 Plaintiff, :
 :
 - against - :
 :
 BRYAN J. HUGEL, :
 :
 :
 Defendant. :
-----X

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Upon the following papers numbered 1 to 28 read on this motion for summary judgment; Notice of Motion/ Order to Shew Cause and supporting papers 1 - 18; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 19-25; Replying Affidavits and supporting papers 26-28; Other _____; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion (002) by defendant, Bryan J. Hugel, 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, is denied.

This is an action sounding in negligence arising out of a two-vehicle automobile accident which occurred on May 12, 2004 in the northbound lane of Elwood Road approximately 150 feet north of Route 25, East Northport. Defendant Bryan Hugel was traveling westbound, exiting a parking lot when he pulled out onto Elwood Road, colliding with the vehicle operated by plaintiff, Lamya Khundy (plaintiff's exhibit A). Both plaintiff and defendant were operating their respective vehicles at the time of the accident.

Plaintiff has claimed in her Bill of Particulars that as a result of the accident she suffered a disc herniation at C 5-6 with mass effect on the ventral thecal sac and spinal cord and acquired central spinal stenosis and foraminal encroachment; disc herniation at L5-S1 with nerve root impingement; disc bulge at L4-5; cervical radiculopathy; lumbar radiculopathy, cervical scoliosis; loss of normal cervical

remain out of work as a substitute teacher's aide until November 2004 due to the injuries sustained in the accident (plaintiff's exhibit D, par.3; *see also*, defendant's exhibit E, p.67-68).

It is noted in the Affidavit of Michele Rubin, M.D. which addresses the MRI's performed of plaintiff's cervical spine and lumbosacral spine on June 29, 2004 (plaintiff's exhibit E), that the MRI of the cervical spine reveals a broad central disc herniation at C5-6 which results in mass effect on the ventral thecal sac and spinal cord, acquired central spinal stenosis, and mild bilateral foraminal encroachment; mildly decreased T-1 marrow signal; incidental vertebral hemangioma of T-2, and cervical scoliosis and loss of normal cervical lordosis, likely related to muscle spasm/pain. The MRI of the lumbar spine reveals an annular bulge at L4-5; right paracentral disc herniation at L5-S1 with right nerve root impingement; incidental vertebral hemangioma of T-12; exaggerated lumbar lordosis, which may be related to muscle spasm/pain.

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 (002), defendant has submitted, inter alia, copies of the summons and complaint; answer; plaintiff's verified bill of particulars; unsigned, unsworn copy of the deposition of plaintiff; uncertified copies of various medical records, tests, MRI report; report of orthopedic surgeon Vartkes Khachadurian, M.D., dated September 29, 2005; a copy of the report of neurologist Burton S. Diamond, dated September 28, 2005; a copy of the radiology report of Stephen W. Lastig, M.D. dated March 6, 2006. In opposing defendant's motion, plaintiff has submitted, inter alia, her affidavit dated January 5, 2007 (exhibit D); a certified copy of a cervical MRI report dated July 1, 2004, certified by Michele Rubin, M.D.; and the affirmation of Socorro Vicente, M.D., plaintiff's treating physician, dated, January 5, 2007.

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 Eyler*, 79 NY2d 955, 582 NYS2d 990 [1992]).

The sworn report of defendant's examining orthopedist, Dr. Khachadurian, dated September 23, 2005, reveals a physical examination was performed on that date and quantifiable limitations were found of the lumbar spine forward flexion (defendant's exhibit K). Dr. Khachadurian did not find other restrictions in the cervical or lumbar spine, and stated in a conclusory manner that the individual range of motion of the joints of the upper extremities is normal and stable, the deep tendon reflexes at the elbows and wrists are normal and Tinel signs are negative at the elbows, wrists and hands. His diagnosis was a status post head contusion by history and cervical sprain and lumbar sprain by history. He finds no clinical evidence of radiculitis or radiculopathy of either upper or lower extremities, neuromotor deficits of either upper or lower extremities, and no clinical evidence of herniated disc of either cervical or lumbar spine. He does, however, give an orthopedic opinion that the occurrence is a competent producing cause of the injury sustained on May 12, 2004. He further states there is no evidence of ongoing orthopedic impairment related to the accident of May 12, 2004.

The sworn report, dated September 28, 2005, of defendant's examining neurologist (defendant's exhibit L), Burton Diamond, M.D., indicates he found no limitations of movement, or any abnormal findings, during his examination of plaintiff. His diagnosis was that of cervical and lumbar sprain, resolved, and head trauma, resolved. However, the report dated March 6, 2006, of radiologist, Stephen Lastig, M.D. (defendant's exhibit M) reveals the findings of annular bulging in the lumbar spine at the L4-5 level, and at L5-S1, very shallow broad-based right posterolateral disc protrusion which displaces epidural fat and abuts the traversing right S1 nerve root. His report further indicates reversal of the cervical lordosis, with multilevel degenerative disc disease with disc desiccation, mild disc space narrowing at the C5-C6 level, well-defined hyperintense lesion identified within the T2 vertebral body consistent with a cavernous hemangioma, and posterior spondylitic changes with osteophytic ridging and annular bulging at the C5-C6 level which efface the ventral subarachnoid space and cause mild flattening of the ventral cervical cord. He found no cervical disc herniation on his review of the MRI.

Neither Dr. Khachadurian nor Dr. Diamond address the MRI findings (plaintiff's exhibit E) which revealed herniated discs at C5-6 and L5-S1 or the disc bulge at L 4-5. Based upon the foregoing, it is determined that defendants have not met their burden of demonstrating entitlement to an order granting summary judgment on the issue of serious injury as 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 [2d Dept 2000]).

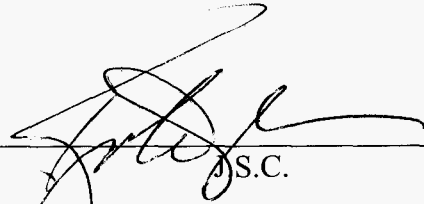
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It is further noted that both Dr. Khachadurian and Dr. Diamond did not examine plaintiff until September 23, 2005 and September 28, 2005 respectively, and not during the statutory period of 180 days following the accident, thus rendering defendant physicians' affidavits insufficient to demonstrate entitlement to an order granting summary judgment and dismissing the complaint on the issue of whether plaintiff was unable to substantially perform all of the material acts which constituted her usual and customary daily activities for a period in excess of 90 days during the 180 days immediately following the accident (*Blanchard v Wilcox*, 283 AD2d 821, 725 NYS2d 433 [3rd Dept 2001]).

Inasmuch as defendants failed to meet their initial burden of establishing a prima facie case, the sufficiency of plaintiff's opposition papers need not be considered (*see, Paulino v. Dedios*, 24 AD3d 741m 807 NYS2d 397 [2nd Dept 2005]; *Birnbaum v Constanza*, 17 AD3d 304, 791 NYS2d 853 [2d Dept 2005]).

Accordingly, defendant's motion (002) for an order granting summary judgment dismissing the complaint is denied.

Dated: MAY 14 2007



J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION