

Charley v Goss

2007 NY Slip Op 31530(U)

April 20, 2007

Supreme Court, New York County

Docket Number: 0102276/2005

Judge: Deborah A. Kaplan

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. DEBORAH A. KAPLAN

PART 22

Justice

CAROLYN CHARLEY

INDEX NO. 102276-2005

MOTION DATE 2-21-07

MOTION SEQ. NO. 003

MOTION CAL. NO. 21

MARGARET E. GOSS, HOWARD J. CONROY
and BENNETT NELSON

FILED
MAY 09 2007
NEW YORK COUNTY CLERK'S OFFICE

The following papers, numbered 1 to 3 were read on this motion for summary judgment - Notice of Motion by defendants Goss and Conroy for Summary Judgment dismissing the complaint on the threshold issue of whether the plaintiff sustained "serious injury" as defined by Insurance Law 5102(d), Affirmation in Opposition of Plaintiff and Reply Affirmation of Defendants.

Cross-Motion: Yes No

In this action to recover damages for injuries arising from a motor vehicle accident, the undisputed facts establish that the parties were involved in a February 14, 2004 collision at approximately 6:15 p.m., near the intersection of Dyer Avenue and West 31st Street, New York, New York. Plaintiff was a passenger in a vehicle owned and operated by defendant Bennett Nelson. That car was allegedly struck on the passenger side by a vehicle owned by defendant Howard J. Conroy and operated by defendant Margaret E. Goss.

Plaintiff commenced the instant action claiming, *inter alia*, that she sustained serious injuries as defined by Insurance Law § 5102(d). In her Bill of Particulars, she alleges injuries including but not limited to her lumbar and cervical spine, bulging discs, cervical sprain/strain, reversal of the normal cervical curvature, right shoulder and arm trauma.

In support of their motion, the defendants submit the affirmed report of Dr. Charles Tortero, a board certified orthopedic surgeon, plaintiff's deposition testimony, her unaffirmed medical records as well as the pleadings previously filed in this case. Dr. Totero performed an Independent Medical Exam (IME) on the plaintiff as part of this litigation on March 27, 2006. He discusses in his report the results of numerous tests performed as well as his observations of the plaintiff's

mobility and flexibility and concludes that her orthopedic exam is within normal limits. He both discusses the plaintiff's prior medical treatment and details her complaints of pain. While he finds that she exhibits a mild decrease of range of motion in her cervical and lumbar spine, he diagnosis her with only cervical, lumbar and shoulder sprains. He concludes her responses to the many objective tests he performed indicate that she does not suffer any disability or permanent injury or limitation. In further support of their motion the movants submit the plaintiff's complete deposition in which she indicates that she missed only two weeks of work as a result of this accident, suspended treatment after a few months and details her subsequent activities.

In opposition, and in support of her claims of "permanent consequential limitation of use/significant limitation of use" and "90/180" under Insurance Law §5102(d), the plaintiff submits the affirmed report of Dr. Paul Post, a board certified orthopedic surgeon, who examined Ms. Charley on December 11, 2006. In his report, the doctor discusses the plaintiffs prior course of treatment which he did not participate in, as well as her current complaints of pain. While he indicates that plaintiff has a limited range of motion as a result of this accident he fails to detail any objective tests administered to support his findings (other than reading her prior records) or any specific limitations in mobility as compared to the norm. He concludes that "in view of the long history of persistent symptomatology and finding of restriction of motion on examination at this date, it is my opinion permanence exists." Plaintiff also submits a copy of her original MRI reports with an affirmation from the physician who interpreted it.

To prevail on a motion for summary judgment, the moving party must produce evidentiary proof in admissible form sufficient to show the absence of any material issue of fact and the right to judgment as a matter of law. See Kosson v Algaze, 84 NY2d 1019 (1995); Alvarez v Prospect Hospital, 68 NY2d 320 (1986); Winegrad v New York Univ. Med Ctr., 64 NY2d 851 (1985); Zuckerman v City of New York, 49 NY2d 557 (1980). Where, as here, a defendant seeks summary judgment on the threshold "serious injury" issue under "No-Fault threshold" issue (Insurance Law § 5102[d]), he or she bears the initial burden of establishing the absence of a "serious injury" as a matter of law. This is because, in enacting Insurance Law §5102(d), the Legislature intended to weed out frivolous claims and limit recovery to significant injuries arising from motor vehicle accidents. See Pommells v Perez, 4 NY3d 566 (2005); Toure v Avis Rent A Car Systems, 98

NY2d 345 (2002); Licari v Elliot, 57 NY2d 230 (1982).

If the moving party makes the requisite showing, the burden then shifts to the opposing party to come forward with proof in admissible form to raise a triable issue of fact requiring a trial. See Kosson v Algaze, *supra*; Alvarez v Prospect Hospital, *supra*; Winegrad v New York Univ. Med Ctr., *supra*; Zuckerman v City of New York, *supra*. The party opposing a motion for summary judgment on the threshold "serious injury" issue must come forward with objective proof of his or her injury to raise a triable issue. See Toure v Avis Rent A Car Systems, *supra*; Dufel v Green, 84 NY2d 795 (1995). Subjective complaints alone are not sufficient. See Toure v Avis Rent A Car Systems, *supra*; Gaddy v Eyler, 79 NY2d 955 (1992).

In this case, defendants have produced evidentiary proof in admissible form sufficient to show the absence of any material issue of fact and the right to judgment as a matter of law. Specifically, they produced the affirmed report of Dr. Tortero, a board certified orthopedist and plaintiff's deposition testimony.

In opposition, the plaintiff failed to come forward with objective proof of her injury to raise any factual issue requiring a trial. She submits merely the affirmed report of Dr. Post and her original MRI report. Although Dr. Post details the plaintiff's recurring discomfort and reports of pain, these subjective complaints alone are not sufficient, as she was required to come forward some objective proof of her injury to raise a triable issue. See Toure v Avis Rent A Car Systems, *supra*; Dufel v Green, *supra*; Gaddy v Eyler, *supra*. The submissions tendered fail to meet this evidentiary burden.

While Dr. Post finds bulging discs with derangement and a restriction of motion for the plaintiff he fails to state how he makes that determination, what tests if any he employed, what the range of motion actually is and how it compares to the norm. It is well settled that "[a]lthough a bulging or herniated disc may constitute a serious injury within the meaning of Insurance Law 5102(d), a plaintiff must provide objective evidence of the extent or degree of the alleged physical limitations resulting from the disc injury and its duration." Monette v Keller, 281 AD2d 523 (2nd Dept. 2001); see Pommels v Perez, 4 NY3d 566 (2005); Mejia v DeRose, 35 AD3d 407 (2nd Dept. 2006); Kearse v New York City Transit Authority, 16 AD3d 45 (2nd Dept. 2005); Diaz v Turner, 306 AD2d 241 (2nd Dept. 2003). Thus, Dr. Post's report fails to adequately address the range of motion

deficits claimed therein. Vasquez v. Reluzco, 28 AD3d 117 (1st Dept. 2006). The proffered submission also fails to provide any foundation for the physician's conclusions. Franchi v. Palmieri, 1 NY3d 536 (2003); Stevens v. Homiak Transport, 21 AD3d 300 (1st Dept. 2005).

Additionally, the plaintiff has failed to demonstrate an inability to perform substantially all of the material acts that constituted her usual and customary duties for 90 of the 180 days following the accident. Otero v. Rodriguez, 36 AD3d 430 (1st Dept. 2007). Finally, she offers contradictory reasons for her cessation of or gap in treatment. See Vasquez v. Reluzco, supra.

Accordingly, the motion of defendants Margaret E. Goss and Howard J. Conroy for summary judgment dismissing the complaint on the ground that the plaintiff did not sustain "serious injury" within the meaning of Insurance Law § 5102(d) is granted, and the complaint is dismissed as against these defendants.

For these reasons and upon the foregoing papers, it is,

ORDERED that the motion of defendants Margaret E. Goss and Howard J. Conroy for summary judgment dismissing the complaint as against them is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further,

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: April 20, 2007

Enter:

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Deborah Kaplan
Deborah A. Kaplan J.S.C.
DEBORAH A. KAPLAN
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