

Bruno v McKee

2007 NY Slip Op 31726(U)

May 31, 2007

Supreme Court, Queens County

Docket Number: 0008105/2005

Judge: Orin R. Kitzes

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Short Form Order

NEW YORK SUPREME COURT -QUEENS COUNTY

PRESENT: ORIN R. KITZES

PART 17

Justice

-----X

IMARTHA BRUNO,
Plaintiff,

Index No.: 8105/05
Motion Date: 5/30/07
Motion Cal. No.: 6

-against-

ROBERTA McKEE and VICTORIA A. McKEE,
Defendants.

-----X

ROBERTA McKEE and VICTORIA A. McKEE
Third-Party Plaintiffs,

-against-

JEAN BRUNO,
Third-Party Defendant.

-----X

The following papers numbered 1 to 9 read on this motion by defendants Roberta and Victoria McKee for an order granting summary judgment in their favor and dismissing the complaint on the grounds that plaintiff Imartha Bruno has not sustained a serious injury within the meaning of Insurance Law §§ 5102 and 5104.

	PAPERS NUMBERED
Notice of Motion-Affirmation-Exhibits.....	1-4
Affirmation in Opposition-Exhibits.....	5-7
Reply Affirmation.....	8-9

Upon the foregoing papers it is ordered that the motion for an order granting summary judgment in defendants Roberta and Victoria McKee’s favor and dismissing the complaint on the ground that plaintiff Imartha Bruno has not sustained a serious injury within the meaning of Section 5102 of the Insurance Law is granted for the following reasons:

This action arises from a motor vehicle accident that occurred on January 9, 2005, at the intersection of 167th Street and 115th Avenue, Queens County, New York. Plaintiff Imartha Bruno commenced this action and alleged in her complaint that she suffered serious injuries from this accident.

It is for the court in the first instance to determine whether plaintiff has established a prima facie case of sustaining a serious injury within the meaning of Insurance Law 5102 (d).

See, Licari v Elliot, 57 NY2d 230,237 (1982); Armstrong v Wolfe, 133 AD2d 957,958 (3rd Dept. 1987.) The analysis of the meaning of serious injury has a long history beginning with Licari v Elliott, *supra*, and applying what could be discerned from the legislative intent, the Court of Appeals, analyzing the word "significant", wrote that "the word 'significant' as used in the statute pertaining to 'limitation of use of a body function or system' should be construed to mean something more than a minor limitation of use. We believe that a minor, mild or slight limitation of use should be classified as insignificant within the meaning of the statute" (Licari v Elliott, *supra*, at 236.) The Court of Appeals reiterated this analysis in Dufel v Green, 84 N.Y.2d 795 (1995), in which it wrote that the legislative intent of the "no-fault" legislation was to weed out frivolous claims and limit recovery to major or significant injuries.

To grant summary judgment it must clearly appear that no triable issue of fact is presented. Miceli v Purex Corp., 84 AD2d 562 (2d Dept. 1981.) Additionally, summary judgment should be granted in cases where the plaintiff's opposition is limited to "conclusory assertions tailored to meet statutory requirements" (Lopez v Senatore, 65 N.Y.2d 1017.) The court need not resolve issues of fact or determine matters of credibility, but must determine whether such issues exist. Bronson v March, 127 AD2d 810 (2d Dept. 1987.)

In support of their motion, defendants have submitted, *inter alia*, plaintiff's deposition testimony, an affirmed report of Dr. Forman, an orthopedist, who examined plaintiff on September 28, 2006, and an affirmed report of Dr. Mendelsohn, a radiologist, who reviewed plaintiff's Magnetic Resonance Images.

Plaintiff testified that as a result of this accident she injured her lower back, right shoulder and neck and missed three to four months of work as a nurse's aid. After the accident she visited Dr. Lambrakis five or six times and went to physical therapy for about three and one half months. She stopped going to therapy as a consequence of her insurance company ceasing payments for therapy. She also stated that five or six years ago, she was involved in another vehicle accident that caused her injuries to the shoulders, neck and back.

Doctor Forman reviewed plaintiff's medical records and performed an examination of plaintiff's lumbar spine, at defendant's request, and concluded that plaintiff was orthopedically stable and without the need of further treatment. He concluded she had resolved sprains in her cervical and lumbar spine and shoulders. Doctor Mendolsohn reviewed plaintiff's MR images of his cervical, and lumbar spine and right shoulder and found age related disc degeneration, no evidence of herniations or traumatically induced injury in the cervical and lumbar spine and tendinitis with no evidence of a rotator cuff tear in

the shoulder.

The Court finds that defendants have submitted proof in admissible form which establishes that plaintiff has not suffered a serious injury within the meaning of Insurance Law § 5102. The Court notes that plaintiff does not argue that defendants have not met their burden of proof on this motion, rather, she claims that her injuries meet the threshold requirements and an issue of fact has been raised that requires the denial of this motion. Consequently, the burden shifted to the plaintiff to come forward with evidence to overcome the defendant's submissions by demonstrating a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law. *See, Toure v Avis Rent A Car Sys.*, 98 NY2d 345 (2002.); *Gaddy v Eyler*, 79 N.Y.2d 955 (1992) ; *Greggs v Kurlan*, 290 AD2d 533 (2d Dept 2002.) To meet this burden, plaintiff must present objective evidence of the injury. The mere parroting of language tailored to meet statutory requirements is insufficient (*see, Powell v Hurdle*, 214 A.D.2d 720 [2d Dept. 1995].) Further, courts have consistently held that a plaintiff's subjective claim of pain and limitation of motion must be sustained by verified objective medical findings (*see, Grossman v. Wright*, 268 A.D.2d 79 (2d Dept 2000.) Moreover, these verified objective medical findings must be based on a recent examination of the plaintiff. *Id.* In that vein, any significant lapse of time between the cessation of the plaintiff's medical treatments after the accident and the physical examination conducted by his own expert must be adequately explained. *Id.* Therefore, in order to successfully oppose a motion for summary judgment on the issue of whether an injury is serious within the meaning of Insurance Law § 5102(d), the plaintiff's expert must submit quantitative objective findings in addition to an opinion as to the significance of the injury. *Id.* This burden has not been met by plaintiff.

In opposition, plaintiff has submitted, *inter alia*, an attorney's affirmation, an affidavit of Dr. Lambrakis, regarding his examination of plaintiff on March 15, 2007, unsworn reports of Dr. Lambrakis, dated January 11, 2005, January 22, 2005, February 5, 2005, February 12, 2005, and March 1, 2005, regarding examinations of plaintiff, unsworn reports of Dr. Khodadadi, a radiologist, dated February 7 & 14, 2005, regarding MR images taken of plaintiff's cervical and lumbar spine, and an unsworn report of Dr. Xethalis, an orthopedist, regarding an examination of plaintiff on February 18, 2005.

Dr. Lambrakis' affidavit indicates that he performed various types of range of motion tests upon plaintiff's cervical, thoracic, and lumbar spine and shoulders and found significant losses. He also found significant and severe muscle spasms in the cervical spine. He concluded that plaintiff will require life long treatment with respect to these losses of motion.

He found that she had permanent injuries and that her shoulder had a torn rotator cuff that required surgery. He also found these injuries to have been caused by the subject vehicle accident. The Doctor's affidavit contains no discussion of his 2005 examinations of plaintiff. Dr. Khodadadi found, *inter alia*, the presence of a small herniated disc at C5-C6 and bulging at C5-C6, L2-L3 and L4-L5 in the MR images of the lumbar and cervical spine.

Plaintiff's proof of an attorney's affirmation is not admissible probative evidence on medical issues. Armstrong v Wolfe, *supra* at 958. Moreover, plaintiff's subjective complaints of pain, unsupported by credible medical evidence, are insufficient to show serious injury. Ranzie v Abdul-Massih, 28 AD3d 447 (2d Dept. 2006.) Georgia v Ramautar, 180 AD2d 713 (2d Dept. 1992.) The unsworn reports and the uncertified medical records are not in admissible form and are not competent to defeat the summary judgment. Grasso v Angerami, 79 NY2d 813 (1991); *See*, Pagano v Kingsbury, 182 AD2d 268 (2d Dept. 1992.) The plaintiff has not offered medical proof in admissible form (*see* Zuckerman v City of New York, 49 N.Y.2d 557 (1980); Pagano v Kingsbury, 182 A.D.2d 268 (2d Dept 1992) that was contemporaneous with the subject accident substantiating her claim of serious injury. Manning v. Tejada, 38 AD3d 622 (2d Dept 2007.) Zinger v Zylberberg, 35 AD3d 851 (2d Dept 2006.) To the extent the plaintiff tendered medical evidence in admissible form, such evidence related only to her current complaints and was therefore insufficient to defeat summary judgment. Zinger v Zylberberg, *supra*. As such, the Doctor Lambrakis' finding of a causal connection between injuries and the subject accident is conclusory and speculative and seemingly tailored to meet statutory requirements. Lagois v. Pub. Adm'r, 303 AD2d 644 (2d Dept 2003.)

Regarding the unsworn radiologist reports, they have been put before this court by defendant's doctors, however, defendants' radiologist described the disc herniations and bulges found in plaintiffs' MRIs as being pre-existing and age-related degeneration and plaintiff has not offered any expert opinion explaining or refuting these findings. *See*, Francis v Christopher, 302 AD2d 425 (2d Dept 2003.) In any event, evidence of disc bulges and herniations, without more, is insufficient to establish a serious injury. Kearse v New York City Tr. Auth., 16 AD3d 45 (2d Dept 2005.) *See*, Pommells v Perez, 4 NY3d 566 (2005.) Moreover, there is no competent evidence that suggests the injuries found in the MR images by plaintiff's radiologist were caused by the subject accident. Consequently, plaintiff has failed to submit competent, objective medical evidence to establish a causal connection between his alleged injuries as found by Dr. Lambrakis and the subject accident. Vaughan v Baez, 305 AD2d 101 (1st Dept 2003.)

Furthermore, the plaintiff has failed to offer a reasonable explanation for the complete cessation of all treatment from approximately March 2005 until March of 2007, after the instant motion was made. Pommells v Perez, supra at 574. While not dispositive, when coupled with a lack of reasonable explanation for having done so, this gap and cessation is a significant factor in assessing the nature of the alleged injuries. *Id.* The plaintiff also failed to proffer competent medical evidence that she was unable to perform substantially all of her daily activities for not less than 90 of the first 180 days subsequent to the accident Mohamed v Siffrain, 19 AD3d 561 (2d Dept 2003.)

Based on the above, the Court finds that plaintiff's submissions have failed to raise a triable issue of fact that she sustained a serious injury. *See*, Gaddy v Eycler, 79 NY2d 955 (1992); Malpica v Lavergne, 294 AD2d 340 (2d Dept 2002.). Consequently, defendants' motion for an order of summary judgment dismissing the complaint and all counterclaims is granted. CPLR 3212.

Dated: May 31, 2007

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ORIN R. KITZES, J.S.C.