

Willis v Hague

2007 NY Slip Op 31801(U)

June 18, 2007

Supreme Court, New York County

Docket Number: 0107703/2003

Judge: Deborah A. Kaplan

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

6-21-07

PRESENT: HON. DEBORAH A. KAPLAN
Justice

PART 22

DELTA CINDY WILLIS

INDEX NO. 107703/03

MOTION DATE 4-04-07

- v -

MOTION SEQ. NO. 001

MOHAMMAD E. HAGUE and
ARK TRANSIT OF NY, INC.

MOTION CAL. NO. 127

The following papers, numbered 1 to 3, were read on this motion by the defendants for summary judgment dismissing the complaint on the ground that the plaintiff did not meet the serious injury threshold requirement of Insurance Law § 5102(d).

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ..

Answering Affidavits — Exhibits

Replying Affidavits

PAPERS NUMBERED

1

2

3

FILED
JUN 25 2007
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: Yes No

E

On May 13, 2000, while stopped in traffic on the Van Wyck Expressway, a vehicle being driven by the plaintiff was struck in the rear by a taxi owned by defendant Ark Transit Inc. and driven by defendant Mohammad Hague. The plaintiff's vehicle then struck the car in front of it and that car, in turn, struck another car.

The plaintiff commenced the instant action seeking damages for injuries she allegedly sustained in the accident. She claims to have sustained a "medically determined injury or impairment of a non-permanent nature which prevented [her] from performing substantially all of the material acts which constitute [her] usual and customary daily activities for at least 90 days during the 180 days immediately following the occurrence of the injury or impairment." Insurance Law § 5102(d). The defendants now move for summary judgment dismissing the complaint on the ground that the plaintiff did not meet this statutory definition of "serious injury."

It is settled law that 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 an issue of fact requiring a trial. See Toure v Avis Rent A Car Systems, 98 NY2d 345 (2002); 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 support of their motion, defendants provide, *inter alia*, the pleadings and the deposition testimony of the plaintiff, taken in September 2006, which establishes that she was transported from the scene of the accident to the emergency room at Jamaica Hospital Center and released the same day with instructions to take Tylenol and follow up with her own doctor. She testified that she visited her doctor, who she identified as Dr. Lackey, about one week later complaining of back and shoulder pain. He did not prescribe any treatment or medications but suggested bed rest and Motrin. The plaintiff elected to undergo a course of physical therapy for her back and left shoulder at Arce Medical a few times a week for 2½ months. She saw improvement after her treatments. She also testified that she was confined to bed for two weeks and stayed at home for 2½ months after the accident, leaving only for doctor appointments.

The plaintiff, a 37-year-old licensed practical nurse, claimed in her Bill of Particulars that she was out of work for only six weeks after the accident. At her deposition, however, she testified that she was out of work for three months and after returning, performed light duty for some time, i.e. no lifting of patients. She eventually resumed all of her duties as an LPN. She testified that she continues to suffer migraine headaches about once a week, occasional pain in her shoulder, lower back and knees and has difficulty walking, sitting and standing for long periods of time. However, there is no particular activity which has been curtailed as a result of the accident. She also testified that she was involved in another rear-end collision in 1996, where she injured her back and neck, was treated at an emergency room and underwent physical therapy for six months.

The defendants also submit the affirmed reports of Dr. Iqbal Merchant, a board-certified neurologist, and Dr. Michael Rafiy, a board-certified orthopaedist, both of whom performed independent medical exams of plaintiff on October 19,

2006, as well as the report of Dr. Howard Hirsh, a board-certified radiologist, who reviewed the plaintiff's MRI films.

Dr. Merchant's examination and testing revealed all normal functioning and full range of motion in the spine. He diagnosed a "cervical, thoracic and lumbar sprain/strain, resolved." He found no neurological disability and found that plaintiff was able to perform all of her normal activities of daily living without restrictions.

Dr. Rafiy diagnosed resolved sprains with full range of motion in the spine, shoulder, hip, knee and right foot. He found no disability or limitations in the plaintiff's functioning from an orthopaedic point of view, and "no permanency or residual effect."

Dr. Hirsh reviewed MRI films of the plaintiff's left knee taken, left shoulder and lumbar spine, all taken in June of 2000. He found all normal results, except for "very slight dextroscoliosis" in the lumbar spine, with no post-traumatic changes.

In opposition to the motion, plaintiff submits a physician's affirmation of Dr. Samuel Arce, a family practitioner who treated her for headaches and shoulder, back and knee pain. In his report, dated May 8, 2001, Dr. Arce states that his physical examination of the plaintiff on 5/17/00 showed, among other things, post-traumatic cervical and lumbosacral radiculopathy syndrome, resolved left shoulder strain and resolved bilateral knee contusion, with range of motion deficits in the cervical spine, thoracolumbar spine and shoulder. He opined that these conditions were "directly related" to the subject accident. A portion of a form apparently completed by Dr. Arce dated July 14, 2000, appended to his affirmed report, states that the plaintiff "can work" but should not "push, pull, carry or lift more than eight lbs." In a "Patient Status Letter" dated August 14, 2000, Dr. Arce states that plaintiff can return to work the next day, exactly three months after the accident.

Plaintiff also submits an *unaffirmed* report of Dr. Jorge Reiley, a board-certified neurologist, who saw her on June 9, 2000. Dr. Reiley found "post-traumatic cervical and lumbosacral spine derangement, sprain, strain" and internal derangement of the left knee", and concluded that these conditions resulted from the accident. His EMG and nerve conduction study revealed "electrophysiological evidence" of borderline cervical radiculopathy at C5 and left compression nerve neuropathy compatible with carpal tunnel syndrome. The plaintiff states she was unable to locate Dr. Reiley to obtain an affirmation for purposes of this motion.

Dr. Michele Rubin reviewed the MRI films of the plaintiff's left knee and left shoulder, taken in June 2000, and found "joint effusion, lateral patellar subluxation and evidence of medial patellar retinacular injury" in the knee and "gelnohumeral joint effusion" in the left shoulder. Dr. Rubin's report gives no opinion as to causation and does not address the plaintiff's 90/180 claim.

The plaintiff also submits an affirmed report of Dr. Steven Struhl, who examined the plaintiff and reviewed x-rays in June of 2000. He found "mild degenerative changes in both knees, " "possible traumatic chondromalacia of the left knee" and "partial rotator cuff tear of the left shoulder." Dr. Struhl's report gives no opinion as to causation and does not address the plaintiff's 90/180 claim.

In further opposition, the plaintiff submits an affirmed report of a psychologist, Dr. Roy Aranda, who, upon a referral from Dr. Arce, evaluated the plaintiff and diagnosed "adjustment disorder with mixed anxiety and depressed mood." Dr. Aranda's report notes that the plaintiff missed only 4 ½ weeks of work after the accident.

The plaintiff also provides a copy of an account statement from chiropractor Dr. Ruth Fernandez, showing she was billed for care from 5/17/00 to 8/10/00.

The defendants have met their burden on this motion by producing 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, *supra*; Alvarez v Prospect Hospital, *supra*; Winegrad v New York Univ. Med Ctr., *supra*; Zuckerman v City of New York, *supra*. That is, the defendants' proof establishes the absence of a "serious injury" as a matter of law under the 90/180 category of Insurance Law § 5102(d). See Lopez v Carpio-Ceballo, 20 AD3d 336 (1st Dept. 2005). The burden then shifted to the plaintiff to present proof in admissible form to raise an issue of fact requiring a trial. See Toure v Avis Rent A Car Systems, *supra*; Dufel v Green, *supra*. The plaintiff failed to meet this burden.

The court notes that while Dr. Arce's affirmed report indicates significant range of motion deficits, it is dated May 17, 2000, four days after the accident, and the plaintiff proffers no proof that any of these deficits persisted beyond that point in time or prevented her from performing substantially all of her usual and customary activities for 90 days after the accident. Moreover, Dr. Arce's recommendation for "light duty" at work indicates nothing more than a "slight curtailment" of the plaintiff's activities. See Gaddy v Eyler, *supra*; Licari v Elliot, *supra*. The report of Dr. Reiley also fails to address this issue and, in any event, as an unaffirmed report, may not be considered on this motion. See Alvarez v Prospect Hospital, *supra*; Zuckerman v City of New York, *supra*; Friends of Animals, Inc. v Associated Fur Manufacturers, Inc., 46 NY2d 1065(1979). Moreover, the plaintiff's 90/180 claim is not only refuted by the defendants' proof, which includes her deposition testimony set forth above and medical proof that she had all normal functioning in 2006, but is undermined by her own Bill of Particulars and opposition papers, which demonstrate that she was able to and did return to work sooner than three months after the accident. Her testimony in that regard as well as "Patient Status Letter" of Dr. Arce dated August 14, 2000, appear tailored to meet the minimum statutory requirement for her claim. See Thompson v Abbassi, 15 AD3d 95 (1st Dept. 2005); Beaubrun v New York City Transit Authority, 9 AD3d 258 (1st

Dept. 2004). Even if the plaintiff were out of work for three months, there is no competent proof that any other of her daily activities were substantially hindered for 90 of the 180 days after the accident. See Uddin v Cooper, 32 AD3d 270 (1st Dept. 2006); Grimes-Carrion v Carroll, 17 AD3d 296 (1st Dept. 2005). As stated above, the plaintiff's subjective complaints alone are not sufficient. See Toure v Avis Rent A Car Systems, *supra*; Gaddy v Eyer, *supra*. The remainder of the plaintiff's proof is insufficient to defeat the defendants' motion.

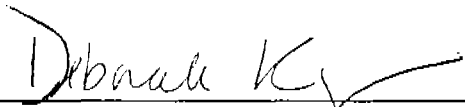
For these reasons and upon the foregoing papers, it is

ORDERED that the defendants' motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court upon submission of appropriate bills of costs, and it is further,

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: June 18, 2007


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

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

FILED
JUN 25 2007
CLERK OF THE COURT