

Holguin v Orioles

2007 NY Slip Op 31875(U)

June 21, 2007

Supreme Court, Suffolk County

Docket Number: 0012467/2005

Judge: Joseph Farneti

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SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

NOEMI HOLGUIN,

Plaintiff,

-against-

THOMAS ORIOLES, JR.,

Defendant.

ORIG. RETURN DATE: MAY 4, 2006
FINAL SUBMISSION DATE: FEBRUARY 15, 2007
MTN. SEQ. #: 001
MOTION: MD

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Upon the following papers numbered 1 to 6 read on this motion _____
FOR SUMMARY JUDGMENT

Notice of Motion and supporting papers 1-3; Answering Affirmation and supporting papers
4, 5; Memorandum of Law 6; it is,

ORDERED that this motion by defendant for an Order, pursuant to CPLR 3212(b) and Insurance Law §§ 5102(d) and 5104(a), granting summary judgment in favor of defendant dismissing plaintiff's complaint, on the grounds that plaintiff did not suffer a "serious injury" as that term is defined by Insurance Law § 5102(d), is hereby **DENIED** for the reasons set forth herein.

This action is to recover for injuries allegedly sustained by plaintiff as the result of a motor vehicle accident involving vehicles driven by plaintiff and defendant on June 18, 2002, near the intersection of Old Willets Path and Engineers Road, in Smithtown, New York.

Defendant now moves for summary judgment, arguing that plaintiff has not met the serious injury threshold as set forth in Insurance Law § 5102(d).

In support thereof, defendant has submitted, among other things, an affirmation of counsel, plaintiff's verified bill of particulars, and a report from an orthopedist who conducted an independent medical examination of plaintiff.

Plaintiff served a verified bill of particulars, sworn to on August 8, 2005, which alleged that she suffered numerous injuries as a result of the accident, including straightened lordosis; bulging discs; cervical radiculopathy; cervical spine sprain/strain; and post-traumatic headaches. Each injury was claimed by plaintiff to be permanent.

Plaintiff was physically examined, on or about February 14, 2006, by S. FARKAS, M.D., an orthopedist designated by defendant. After conducting an examination of plaintiff, Dr. Farkas found, as indicated by his sworn report, that plaintiff had no orthopedic disability and arrived at a diagnosis of resolved cervical and lumbar sprain. Dr. Farkas found that plaintiff may perform the daily activities of living, without restriction. Based upon this finding, defendant argues that plaintiff has not satisfied the "serious injury" threshold, as set forth in Insurance Law § 5102(d). Defendant contends that plaintiff's alleged soft tissue injuries do not constitute a serious injury.

In opposition to the instant application, plaintiff has provided recent medical evidence of plaintiff's limitations. Specifically, plaintiff has submitted an affidavit and medical reports of the treating chiropractor THOMAS SCHUETTE, D.C. In addition, plaintiff has submitted an affidavit and MRI report of a radiologist, DAVID PAYNE, M.D., and an affidavit and EMG report of EDWARD MILMAN, M.D. Plaintiff argues that the foregoing submissions establish that plaintiff has suffered a serious injury, in that the medical records and reports, which are based upon objective tests and diagnostic studies, show that plaintiff has permanent consequential limitation of movement and further establishes the duration of the limitation. The affidavit of THOMAS SCHUETTE, D.C. indicates that Dr. Schuette treated plaintiff beginning approximately one month after the accident, and then re-evaluated her on or about August 7, 2006. Objective tests performed by Dr. Schuette, including the use of a goniometer, reveal that plaintiff still has loss of range of motion as of August 7, 2006. Further, Dr. Schuette opines that the prognosis for a complete recovery by plaintiff is "poor," and that plaintiff suffered permanent injuries as a result of the subject automobile accident.

New York's No-Fault Insurance Law precludes recovery for any "non-economic loss, except in the case of serious injury, or for basic economic loss"

arising out of the negligent use or operation of a motor vehicle (Insurance Law § 5104[a]). As recognized by the Court of Appeals, the “legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries” (*Dufel v Green*, 84 NY2d 795 [1995]; see also *Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Licari v Elliott*, 57 NY2d 230 [1982]). The Legislature also intended that the issue of whether a plaintiff sustained a “serious injury” could be determined by the courts as a matter of law on a motion for summary judgment (see *Licari v Elliott*, 57 NY2d 230, *supra*).

Insurance Law § 5102(d) defines “serious injury” as “a personal injury which results in death; 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” (Insurance Law § 5102[d]).

To establish a permanent consequential limitation or a significant limitation of use, the medical evidence submitted by a plaintiff must include objective, quantitative evidence with respect to diminished range of motion or a qualitative assessment, based on objective findings, comparing the plaintiff’s present limitations to the normal function, purpose and use of the affected body, organ, member or function (see *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, *supra*). “Whether a limitation of use or function is ‘significant’ or ‘consequential’ ... relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part” (*Dufel v Green*, 84 NY2d 795, *supra*; see *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, *supra*). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (see *Licari v Elliott*, 57 NY2d 230, *supra*). Further, subjective claims of pain and limitation of movement must be verified by objective medical findings that are based on a recent examination of the plaintiff (see *Ali v Vasquez*, 19 AD3d 520 [2005]; *Batista v Olivo*, 17 AD3d 494 [2005]; *Grossman v Wright*, 268 AD2d 79 [2000]).

A movant seeking summary judgment on the ground that a plaintiff’s negligence claim is barred under the No-Fault Insurance Law bears the initial

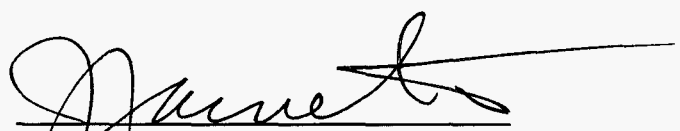
burden of establishing a *prima facie* case that the plaintiff did not sustain a "serious injury" (see *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, *supra*; *Gaddy v Eyley*, 79 NY2d 955 [1992]; *Pagano v Kingsbury*, 182 AD2d 268 [1992]). Once a movant meets this burden, the plaintiff must present proof in admissible form showing that a serious injury exists or demonstrate an acceptable excuse for failing to meet the requirement of tender in admissible form (*Gaddy v Eyley*, 79 NY2d 955, *supra*; *Pagano v Kingsbury*, 182 AD2d 268, *supra*; *Grasso v Angerami*, 79 NY2d 813 [1991]; see generally *Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Gong v Joni*, 294 AD2d 648 [2002]; *Romano v St. Vincent's Med. Ctr.*, 178 AD2d 467 [1991]; *Comms. of the State Ins. Fund v Photocircuits Corp.*, 2 Misc 3d 300 [Sup Ct, NY County 2003]).

In the case at bar, the Court finds that defendant's submission was sufficient to establish that plaintiff did not sustain a "serious injury" as a result of the accident (see *Hernandez v DIVA Cab Corp.*, 22 AD3d 722 [2005]; *Khan v Hamid*, 19 AD3d 460 [2005]; *Luckey v Bauch*, 17 AD3d 411 [2005]). The burden, therefore, shifted to plaintiff to raise a triable issue of fact. In opposition, plaintiff presented competent medical evidence substantiating her claim that her injuries caused a permanent consequential limitation of use of a body organ or member, or a significant limitation of use of a body function or system. The Court finds that such submissions were sufficient to rebut defendant's *prima facie* showing of no serious injury (see *Gordover v Balandina*, 2007 NY Slip Op 5225 [2d Dept 2007]; *Paz v Wydrzynski*, 2007 NY Slip Op 4807 [2d Dept 2007]; *Dickie v Pei Xiang Shi*, 304 AD2d 786 [2003]).

Accordingly, this motion by defendant for summary judgment dismissing plaintiff's complaint, on the grounds that plaintiff has failed to sustain a "serious injury" as that term is defined by Insurance Law § 5102(d), is denied.

The foregoing constitutes the decision and Order of the Court.

Dated: June 21, 2007


HON. JOSEPH FARNETI
Acting Justice Supreme Court