

Riley v Tustison

2007 NY Slip Op 31884(U)

June 28, 2007

Supreme Court, Greene County

Docket Number: 0020051/0781

Judge: Joseph C. Teresi

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK
SUPREME COURT

COUNTY OF GREENE

CONNIE RILEY and JOHN RILEY,
her husband,

Plaintiffs,

-against-

DONALD H. TUSTISON,

Defendant.

DECISION and ORDER
INDEX NO. 05-1078
RJI NO. 19-06-2311

Supreme Court Greene County All Purpose Term, June 18, 2007
Reassigned to Justice Joseph C. Teresi

APPEARANCES:

John P. Kingsley, P.C.
Attorneys for Plaintiff
329 Main Street
Catskill, New York 12414

O'Connor, Redd & Sklarin, LLP
Attorneys for Defendant
April J. Laws, Esq. of Counsel
200 Mamaroneck Avenue
White Plains, New York 10601

TERESI, J.:

Defendant seeks an order for summary judgment dismissing the complaint alleging the plaintiff did not sustain a serious injury pursuant to Insurance Law § 5102(d). In opposing such relief, plaintiff argues there are material issues of fact which preclude summary judgment.

The instant action arose as a result of a three car chain collision that occurred on May 18, 2004 on Bridge Street, Catskill, New York when plaintiff's vehicle was struck from the rear by the defendant. Plaintiff alleges as a result of the defendant's negligence, plaintiff sustained

serious injuries to her cervical and lumbar spine and her knees as defined by Insurance Law § 5102. The plaintiff was involved in a subsequent three car chain collision that occurred on July 26, 2006

On a motion for summary judgment, the movant must establish by admissible proof, the right to judgment as a matter of law. See, Alvarez v Prospect Hospital, 68 NY2d 320 (1986); Gilbert Frank Corp. v Federal Insurance Co., 70 NY2d 966 (1988). The burden shifts to the opponent of the motion to establish by admissible proof, the existence of genuine issues of fact. See, Zuckerman v City of New York, 49 NY2d 557 (1980). It is well established that on a motion for summary judgment, the court's function is issue finding, not issue determination. See, Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395 (1957), and all evidence must be viewed in the light most favorable to the opponent to the motion. See, Crosland v. New York City Transit Auth., 68 NY2d 165 (1986).

In opposing a motion for summary judgment, one must produce evidentiary proof in admissible form . . . mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient. See, Zuckerman v City of New York, supra, 562. It is incumbent upon the non-moving party to lay bare her proof in order to defeat summary judgment. See, O'Hara v Tonner, 288 AD2d 513 (3rd Dept. 2001). Mere conclusionary assertions, devoid of evidentiary fact, are insufficient to raise a genuine triable issue of fact on motion for summary judgment as is reliance upon surmise, conjecture or speculation. See, Banco Popular North America v. Victory Taxi Management, Inc., 1 NY3d 381 (2004).

As the moving party, defendant, in the first instance, is required to present evidence in admissible form sufficient to establish plaintiff did not suffer a serious injury within the meaning

of Insurance Law § 5102. See, Kristel v. Mitchell, 270 AD2d 598 (3rd Dept. 2000). In support of the motion, the defendant offers plaintiff's medical reports and records from her treating physicians, physical therapy sessions, x-rays and a MRI. The defendant alleges plaintiff's medical treatments were for contusions to the knees and neck strain. Dr. Kevin Barron, a board certified neurologist conducted an IME of the plaintiff on November 29, 2006. Dr. Barron reviewed the MRI and stated the plaintiff sustained a right paracentral disc herniation at L5-S1 without foraminal narrowing and there was disc desiccation at the L5-S1 level. Dr. Barron noted a small right parasagittal herniated disc at C4-5. Dr. Barron found plaintiff's range of motion of the neck and back was limited. Dr. Barron concluded:

Ms, Connie Riley has evidence of cervical and lumbar spondylosis that preceded the accident of 5/18/04. The desiccated disc at L5-S1 and the minor osteophytic degenerative change at C4-5 preceded the accident of record. I do believe that Ms. Riley did sustain a lumbrosacral disc herniation, L5-S1 as a result of the accident 5/18/04. I do not find on neurological examination, however, objective abnormality sufficient to support her longstanding absence from work... The symptoms that she has in the right upper extremity are not explicable on the basis of the spondylotic change she presents at C4-5.

Dr. Brian Bilfield, a board certified orthopaedic surgeon, conducted an IME of the plaintiff on December 21, 2006. Dr. Bilfield noted that the plaintiff was involved in another accident two months after the first accident. Dr. Bilfield noted pain to the right side of the neck upon rotation. Dr. Bilfield found no tenderness over the cervical spine and no evidence of spasm in the lower lumbar spine. Dr. Bilfield concluded:

The patient sustained two motor vehicle accidents within two months of each other. The MRI done for her cervical and lumbar spine post date the second motor vehicle accident. There is no indication that the findings on those two MRI's (cervical and lumbar) are related to the first motor vehicle accident on 5/18/04. At the time of her examination in my office, there

were no localizing objective findings for the cervical, thoracic, or lumbar spine. She had a negative exam for carpal tunnel syndrome in both wrists...Dr. Mc Cormick did not indicate in his report the fact she had a second motor vehicle accident several months after the original accident. I find no objective evidence of limitation for this patient's cervical, thoracic or lumbar spine. I do not find any objective evidence of disability for the cervical, lumbar or thoracic spine, and knees related to the accident of 5/18/04.

Once a showing is made that the plaintiff did not suffer a serious injury, the burden shifts to plaintiff to proffer competent medical evidence based upon objective medical findings and diagnostic tests to support her claim. See, Gladdy v. Eyler, 79 NY2d 955 (1992). The burden shifts to plaintiff to bring forward admissible evidence that plaintiff did sustain a serious injury. See, John v. Engel, 2 AD3d 1027 (3rd Dept. 2003).

In opposition to the summary judgment motion, plaintiff offered a report dated December 2, 2005 from Dr. Paul Jones, a board certified orthopaedic surgeon. Dr. Jones determined that plaintiff's cervical motion was moderately diminished in all planes. Dr. Jones reviewed the MRI and found disc herniations at L5-S1 and C4-5. Dr. Jones diagnosed plaintiff of having lumbar syndrome with possible right radiculopathy and a cervical syndrome. Dr. Jones believed the plaintiff's prognosis is guarded and the injuries she sustained is causally related to the accident. Dr. Jones found the plaintiff could only do sedentary work. Dr. Jones examined the plaintiff again on September 29, 2006 and determined her cervical motion was diminished by 50% in flexion, extension and turning to the left and right. Dr. Jones stated plaintiff's forward flexion of her lower back was about 30 degrees and tilting and twisting were limited to 20 degrees and extension to 10 degrees. Dr. Jones determined that the plaintiff had a temporary total disability and she was unable to work. Dr. Jones stated that plaintiff's injuries were casually related to the

accident.

An IME was performed by Dr. Ike Boka who had reviewed plaintiff's medical records and MRI results. Dr. Boka found restricted motion of the neck and lower back. Dr. Boka determined there was significant loss of motion and the rotation of the lumbar spine was 15 degrees to the left and 25 degrees to the right. Dr. Boka stated the plaintiff's cervical and lumbar problems were casually related to the 5/18/04 accident.

Plaintiff alleges in her Bill of Particulars that she sustained 1) a permanent loss or use of a body organ, member function or system 2) a permanent consequential limitation of use of a body organ or member, 3) a significant limitation or use of a body function or system and 4) and inability to perform substantially all of the material acts which constitute plaintiff's usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident.

The law requires that plaintiff's limitation of use be more than minor, mild or slight and that plaintiff's claim be supported by medical proof based upon credible medical evidence of an objectively measured and quantified medical injury or condition (Lanuto v. Constantine, 192 AD2d 989, (3rd Dept), lv denied 82 NY2d 654 (1993)). In cases where treating physicians have been able to quantify a limitation of use, plaintiff's claims of serious injury can be substantiated under the "significant limitation of use" category of serious injury (Toure v. Avis Rent A Car Systems, Inc., 98 N.Y. 2d 345 (2002)).

Plaintiff has not offered any substantial proof that she sustained a permanent loss of use of a body organ, member function or system or that she was prevented from performing substantially all of her customary activities for more than 90 days during the first 180 days

immediately following the accident. Defendant is entitled to summary judgment relating to those portions of this motion. See, Insurance Law § 5102(d). Plaintiff has adequately opposed defendants' summary judgment motion alleging she did sustain a permanent consequential limitation or use of body organ or member and/or sustain a significant limitation of use of a body function or system. A review of the record reveals that the plaintiff has sustained her burden of proof in order to defeat summary judgment by demonstrating issues of fact as to whether she sustained a serious injury with a permanent consequential limitation of use of a body organ or member and a significant limitation of use of a body function system as required by Insurance Law § 5102(d). See, Oberly v. Bangs Ambulance, 96 NY2d 295 (2001); Toure v. Avis Rent A Car Sys. 98 NY2d 345 (2002). Plaintiff submitted sufficient objective evidence to overcome defendant's prima facie showing and create a triable issue of fact concerning the existence of a serious injury. See, Dooley v. Davey, 21 AD 3d 1242 (3rd Dept. 2005). Plaintiff has demonstrated a triable issue of fact with an affidavit that included her medical expert's "designation of a numeric percentage of plaintiff's loss of range of motion". See, Toure v. Avis Rent A Car Sys., supra 350; Camilo v. Forlini, 304 AD 2d 386 (1st Dept. 2003).

Defendant's motion for summary judgment is granted in part and denied in part.

All papers, including this Decision and Order are being returned to the attorneys for the defendant. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel are not relieved from the applicable provision of that section respecting to filing, entry and notice of entry.

So Ordered.

Dated: Albany, New York
June 28, 2007


Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion dated March 19, 2007;
2. Affidavit of April J. Laws, Esq. dated March 19, 2007 with attached exhibits A-V;
3. Affidavit of John P. Kingsley, undated with attached exhibits 1-10;
4. Affidavit of Connie Riley dated June 8, 2007;
5. Affirmation of April J. Laws, Esq. dated June 26, 2007.