

Jarrett v Dayle

2007 NY Slip Op 31936(U)

May 20, 2007

Supreme Court, New York County

Docket Number: 0121923/2003

Judge: Deborah A. Kaplan

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.

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

PRESENT: HON. DEBORAH A. KAPLAN
Justice

PART 22

TONICA JARRETT, an infant by her mother and natural guardian, ALICIA ROLLING, LASHONDA ROLLING, an infant by her mother and natural guardian, ALICIA ROLLING and ALICIA ROLLING Individually

INDEX NO. 121923/03

MOTION DATE 3-21-0

MOTION SEQ. NO. 002

MOTION CAL. NO. 54

- v -

DAVIN DAYLE

The following papers, numbered 1 to 2 were read on this Motion by defendants for summary judgment on the threshold "serious injury" issue (Insurance Law 5102[d]).

PAPERS NUMBERED

Notice of Motion – Affidavits – Exhibits 1

Affirmation in Opposition 2

Cross-Motion: Yes No

FILED
JUL 02 2007
NEW YORK COUNTY CLERK'S OFFICE

In this action to recover damages for injuries sustained in a motor vehicle accident, it is alleged that on March 2, 2002, on the Grand Central Parkway near the intersection of 168th Street in Queens, a vehicle being driven by plaintiff Alicia Rolling was struck in the rear by a vehicle being driven by defendant Davin Dayle.

Plaintiffs commenced the instant action claiming, *inter alia*, that they sustained serious injuries as defined by Insurance Law § 5102(d) - i.e. "permanent consequential limitation of use of a body function or system." The defendant now moves for summary judgment dismissing the complaint on the ground that plaintiffs did not sustain a serious injury within the meaning of Insurance Law § 5102(d).

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, the defendant has 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 pleadings, the deposition testimony of the parties, and the affirmed reports of Dr. Ravi Tikoo, a board certified neurologist, who examined plaintiffs Tonicia Jarrett, Lashonda Rolling and Alicia Rolling on May 31, 2006, Dr. Carl Weiss, a board certified orthopedic surgeon who examined plaintiffs Tonicia Jarrett, Lashonda Rolling and Alicia Rolling on March 9, 2006 and Dr. Richard Heiden a radiologist, who reviewed plaintiffs Tonicia Jarrett, Lashonda Rolling and Alicia Rolling's MRI's dated April 20, 2002 and April 27, 2002.

In his report, Dr. Tikoo states that plaintiff Tonicia Jarrett, reported that she had back pain and that her condition has remained the same sine the accident. Dr. Tikoo performed a number of objective tests, all of which are described in his report. In particular, his report states that she has a history of lumbosacral strain. Dr. Tikoo states that plaintiff Lashanda Rolling currently complains of neck and back pain which has only improved a little since the accident. Dr. Tikoo performed a number of objective tests all where essentially normal. He opined that she had a history of cervical strain and lumbosacral strain. Dr. Tikoo also found that plaintiff Alicia Rolling complained of headaches, neck, back and bilateral knee pain. He noted that she has a history of a hysterectomy in 1997 and a prior motor vehicle accident causing a neck injury. Dr. Tikoo after conducting numerous objective tests which are detailed in his report opined that she has a history of cervical strain, history of lumbosacral strain and soft tissue injuries. Dr. Tikoo was of the opinion that all three plaintiffs had no "evidence of neuropathy, radiculopathy, or disc herniation" and had essentially normal neurological tests.

Dr. Weiss states in his report that Tonicia Jarrett complained of neck and lower

back. Dr. Weiss performed objective range of motion tests which are described in his report. He concludes that Tonicia Jarret has a normal orthopedic examination and only cervical and lumbar sprains from which she has recovered completely. Dr. Weiss states in his report that plaintiff Lashanda Rolling complained of pain in the back and neck. He conducted range of motion tests which had normal results, and concludes that she suffered a cervical and lumbar sprain and has completely recovered. Dr. Weiss states in his report that Alicia Rolling complained of head pain. After performing range of motion tests, with normal results he concluded that she suffered sprain injuries of the neck and back, from which she has recovered completely.

Dr. Heiden reviewed Tonicia Jarrett's MRI's dated April 20, 2002. His impressions were normal MRI of the cervical spine and disc bulges at L4-5 and L5-S1 of the lumbar spine. However, he finds the bulge is a manifestation of degenerative spondyloarthropathy. Dr. Heiden reviewed Lashanda Rolling's MRI's dated April 20, 2002 and April 27, 2002. His impressions were that reversal of the cervical lordosis of the cervical spine. However he concludes that this is a non-specific finding frequently related to the patients position and comfort during the examination. His review and impressions of the lumbar spine MRI was normal. Dr. Heiden's review of plaintiff Alicia Rolling's MRI dated April 20, 2002 showed cervical spine straightening, disc bulges at C4-5, C5-6 and C7-T1 and dehydration at L3-4, L4-5 and L5-S1 of the lumbar spine. He concludes that these findings are the result of degenerative spondyloarthropathy and not casually related to the accident.

The defendant's proof entitles them to judgment as a matter of law on the threshold issue of "serious injury", thereby shifting the burden to the plaintiffs. In opposition to the motion, the plaintiffs submit the affirmations of Dr. Robert Diamond dated, February 6, 2007 which he refers to and affirms his previous narrative report dated April 22, 2002 and Dr. Joseph Gregorace, which he refers to and affirms his previous narrative reports dated March 11, 2002, April 16, 2002, May 20, 2002, July 2, 2002 and June 8, 2006.

Dr. Diamond reviewed Alicia Rolling's MRI results and found she had C4-5, C5-6 and T1-2 disc bulges of the cervical spine and L3-4 through L5-S1 disc bulges of the lumbar spine. Dr. Diamond's review of Tonicia Jarrett's MRI found C3-4 and C4-5 disc bulges of the cervical spine and L1-2 through L5-S1 disc bulges of the lumbar spine. His review of Lashanda Rolling's MRI results found L2-3 through L4-5 disc bulges, L5-S1 disc herniations of the lumbar spine and C3-4 through C6-7 disc bulges of the cervical spine.

Dr. Gregorace's report states that he performed a physical examination of plaintiffs including objective range of motion testing using a hand held goniometer along with a review of their medical records on March 11, 2002, April 16, 2002, May 20, 2002, July 2, 2002 and June 8, 2006. On June 8, 2006 Dr. Gregorace found restriction in plaintiff Alicia

Rolling's range of motion - lumbar spine extension was decreased from 30 to 20 degrees and lumbar flexion was decreased from 90 to 64 degrees; cervical spine extension was normal, right rotation decreased from 80 to 60 degrees, left rotation decreased from 80 to 58 degrees and flexion was decreased from 60 to 46 degrees. Dr. Gregorace's impression at that time was Alicia Rolling "presents with a permanent partial disability owing to her spinal injuries." In his February 6, 2007 affirmation Dr. Gregorace states that these injuries are causally related to the subject accident.

On June 8, 2006, Dr. Gregorace states in his report that plaintiff Tonicia Jarrett's range of motion - lumbar spine extension was normal and lumbar flexion was decreased from 90 to 72 degrees. Her cervical spine range of motion was normal. He concluded that she has a permanent partial disability owing to her lumbar spine injury and that there is a causal relationship. On June 8, 2006, Dr. Gregorace states in his report that plaintiff Lashanda Rolling's range of motion - lumbar spine extension was decreased from 30 to 22 degrees and lumbar flexion was decreased from 90 to 70 degrees; cervical spine extension was normal, right rotation decreased from 80 to 64 degrees, left rotation decreased from 80 to 56 degrees and flexion was decreased from 60 to 50 degrees. Dr. Gregorace concludes at that time that plaintiff "presents with a permanent partial disability owing to her cervical spine and lumbar spine injuries." He concludes in his February 6, 2007 affirmation that these injuries are causally related to the subject accident.

Accordingly, the defendants' motion for summary judgment dismissing the complaint on the ground that the plaintiffs did not sustain "serious injury" within the meaning of Insurance Law § 5102(d) is denied.

For these reasons and upon the foregoing papers and oral argument held, it is,

ORDERED that the motion of the defendants for summary judgment on the issue of whether plaintiff sustained a "serious injury" as defined by Insurance Law §5102(d) is denied, and it is further,

ORDERED that all parties are to appear for a ^{mediation} ~~compliance~~ conference scheduled for July 29, 2007, at ~~DCM~~ ^{Feb-2} 9:30 a.m. (80 Centre Street, Room ~~100~~ ¹⁰⁶).

This constitutes the Decision and Order of the Court.

Dated: May 20, 2007

Deborah Kaplan
Deborah A. Kaplan J.S.C.
NEW YORK COUNTY CLERK'S OFFICE
JUL 02 2007
FILED
DEBORAH A. KAPLAN
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST