

Wallace v Hoffman

2007 NY Slip Op 32293(U)

July 24, 2007

Supreme Court, Suffolk County

Docket Number: 0022286/2003

Judge: Paul J. Baisley

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 - STATE OF NEW YORK
CALENDAR CONTROL PART - SUFFOLK COUNTY

PRESENT:

HON. PAUL J. BAISLEY, JR., J.S.C.

-----X

JAMES WALLACE and DENISE EATON,

Plaintiff,

-against-

SARINA HOFFMAN,

Defendant.

-----X

INDEX NO.: 22286-2003

CALENDAR NO.: 20060196MV

MOTION DATE: December 28, 2006

ADJ. DATE: May 16, 2007

MOT NO.: 003 MOT D

004 MD

PLAINTIFF'S ATTORNEY:

LAW OFFICES OF JOHN J. GUADAGNO, P.C.
136 East Main Street
East Islip, New York 11730

DAVID N. SLOAN, ESQ.
Atty. for Pltf. on Counterclaim
30 Jericho Executive Plaza, Suite 200W
Jericho, New York 11753

DEFENDANT'S ATTORNEY:

JACOBSON & SCHWARTZ
By: Michael C. Weiner, Esq.
510 Merrick Road
P.O. Box 46
Rockville Centre, New York 11571

Upon the following papers numbered 1 to 26 read on this motion and cross motion for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers 1- 14; Notice of Cross-Motion and supporting papers 15-24; Answering Affidavits and supporting papers 25-26; it is,

ORDERED that this motion by the defendant for summary judgment dismissing the complaint because of the failure of each of the plaintiffs to meet the serious injury threshold set forth in the Insurance Law §5104 is considered together with a cross-motion by the plaintiffs for summary judgment stating that they each have met the threshold and placing the action on the calendar for a trial on damages. They are decided as follows:

Plaintiffs were involved in a motor vehicle accident on February 23, 2003. James Wallace was taken by ambulance to a hospital emergency room complaining of pain in his neck, left shoulder and back. X-rays were taken and he was released. He treated with Dr. Weisman, an internist, Dr. Foster, a chiropractor, and Dr. Piacapane, an orthopedist, who saw him twice. Dr. Singh, a neurologist, treated him from March 17, 2003 until June 4, 2003. An MRI of the cervical spine was performed on March 12, 2003. It revealed "straightening of the cervical curvature compatible with reflex muscle spasm; C2/3 through C4/5 posterior disc bulges; C5/6 posterior disc herniation with central canal stenosis and extension to abut the ventral cord; T1/2 posterior disc herniation with ventral CSF impression." An MRI of the lumbar spine performed on March 22, 2003 revealed " L3/4

through L5/S1 Posterior disc herniations. A electromyography report dated March 28, 2003 reveals a possible cervical radiculopathy on the right side at the C6 level. He was not working at the time of the accident and testified that he was confined to his bed for one week after the accident.

Plaintiff, DENISE EATON, was also taken from the scene of the accident by ambulance to a hospital emergency room complaining of neck and back pain. X-rays were taken and she was released. She treated with Dr. Singh, a neurologist from March 17, 2003 until November 4, 2003. She treated with Dr. Weisman three times and Dr. Foster twice a month until February 2005. An MRI of the cervical spine performed on March 12, 2003 revealed, "Cervical kyphosis compatible with reflex muscle spasm; C3/4 posterior disc herniation with ventral CSF impression; C4/5 and C5/6 posterior disc herniations with ventral cord impression and central canal stenosis." An MRI of the lumbar spine was performed on March 22, 2003. It revealed "L2/3 and L5/S1 posterior disc bulges; L3/4 and L4/5 posterior disc herniations; free fluid in the cul-da-sac...". An MRI of the thoracic spine performed on March 26, 2003 revealed, "No abnormalities noted in the thoracic spine; on the cervical localizer series, a kyphotic cervical curvature is noted with evidence of C2/3 through C4/5 posterior disc extension..." An electromyography performed on April 1, 2003 revealed, "mild denervation of both lower extremities and reinnervation of the right anterior tibialis muscle and right vastus lateralis muscle. Overall the study is most consistent with lumbosacral radiculopathy most prominent on the right side at the L4 and L5 levels." At the time of the accident she was a home health care worker and she was unable to return to work for four months. Thereafter she returned to light duty. She stopped treatment due to the lack of insurance.

The legislature in enacting the no-fault law intended that the court should decide the threshold question of whether the evidence would warrant a jury finding that the injury falls within the class of injuries that, under no-fault, should be excluded from judicial remedy. If it can be said, as a matter of law, that plaintiff suffered no serious injury within the meaning of the Insurance Law §5102(d), then plaintiff has no claim to assert and there is nothing for the jury to decide (*Licari v. Elliott*, 57 N.Y.2d 230, 455 N.Y.S.2d 570). If on the other hand, the plaintiff has met his or her burden to present a prima facie case then the issue is one for the jury, regardless of the adequacy of the defendant's proof to raise an issue of fact. This is an abrogation of the normal role of the court on a motion for summary judgment which involves issue finding and in which the court may grant summary judgment to a non-moving party should the facts so warrant. Here under no-fault, the defendant bears the initial burden to show that the plaintiff has not met the threshold and therefore is without a judicial remedy. Accordingly, the cross-motion of the plaintiffs for a summary finding that they have in fact met the threshold under the 90/180 day category and for an immediate trial on damages is denied.

Regarding the plaintiff, MIKE WALLACE, the defendant submits the report of her examining orthopedist. The examination was performed on November 24, 2006. Page three of the report is missing. The report notes that ranges of motion were measured by observation not mechanical means and he concludes that the patient suffered a resolved thoracic and lumbosacral strain. He states, "There are no clinical findings which would correlate with the reported impression of the MRI of the lumbar spine dated March 24, 2003." Defendant's neurologist examined this plaintiff on May 6, 2006 and concluded that there were no neurological deficits. Defendant also submits the report of a radiologist who reviewed the MRI scans and attributed the presence of disc space narrowing to a degenerative process which preexisted the accident. This radiologist also compared the MRI of the lumbar spine to a more recent scan dated October 20, 2004 and concluded that there is an absence of any progression of the degenerative changes.

Soft tissue injury involving complaints of pain in the neck and back due to strain/sprain do not generally meet the threshold for serious injury (*Georgia v. Ramautar*, 180 AD2d 713, 579 NYS2d 743). However, such injuries may constitute a serious injury if certain proof is submitted. The case law requires objective proof of both the pain and the limitation of movement. Proof of a disc herniation alone without objective proof of limitation of movement is insufficient to meet the threshold (*Uber v. Heffron*, 286 A.D.2d 729, 730 N.Y.S.2d 174; *Descovich v. Blieka*, 279 A.D.2d 499, 718 N.Y.S.2d 870); as is a doctor's observations of pain accompanying by reduced flexion unless accompanied by objective proof such as x-rays, MRIs, straight-leg or Laseque tests, and any other similarly recognized tests or quantitative results based on a neurological examination (*Grossman v. Wright*, 268 A.D.2d 79, 707 N.Y.S.2d 233). Furthermore, even where there is objective medical proof, when additional contributory factors interrupt the chain of causation between the accident and claimed injury, such as a gap in treatment, an intervening medical problem or a preexisting condition, summary dismissal of the complaint may be appropriate (*Pommells v. Perez* 4 N.Y.3d 566, 797 N.Y.S.2d 380, 830 N.E.2d 278).

Here, defendant's proof is sufficient to establish that the Mr. Wallace's soft tissue injury does not meet the threshold. Any herniations were found to be degenerative and the orthopedist found full range of motion based on his qualitative assessment (*Toure v. Avis Rent A Car Systems, Inc.*, 98 N.Y.2d 345, 746 N.Y.S.2d 865, 774 N.E.2d 1197). Accordingly, the burden shifts to the plaintiff. As noted, plaintiff has submitted sworn MRI reports taken within a month of the accident which do in fact show disc herniations and bulges. However, although his treating neurologist opines that Mr. Wallace suffered a permanent loss of mobility in his spine as a result of the injuries suffered in the accident, he only treated the plaintiff for approximately three months after the accident. He last saw him on June 4, 2003. Mr. Wallace does not provide proof of a recent medical examination (*Grossman v. Wright*, 268 A.D.2d 79, 707 N.Y.S.2d 233; *Bent v. Jackson*, 15 A.D.3d 46, 788 N.Y.S.2d 56) nor any explanation of why he stopped treatment. Defendant also points to a prior injury to his left shoulder which is not addressed and his deposition testimony states that he was confined to bed for one week after the accident, thereby negating any claim under the 90/180 day category. Accordingly, summary judgment dismissing the claim of Mr. Wallace is granted.

Turning to the claim of Denise Eaton, defendant's orthopedist report of an examination conducted on April 28, 2006 reveals complaints of pain in left knee when squatting, reduced range of motion in lumbosacral spine extension, and reduced range of motion in the cervical spine. He opines cervical and lumbrosacral sprain even though this examine is three years post the accident. The neurologist who examined her on May 9, 2006 opined that she had a normal neurologic examination with resolved cervical and lumbrosacral sprain/strain. Defendant's radiologist also reviewed Ms. Eaton's MRI scans of the cervical, lumbar and thoracic spine. He stated that there were no disc herniations in the cervical spine but rather disc space narrowing which he attributed to degeneration. He found no disc herniations in the lumbar or thoracic spine which he characterized as normal. Defendant's proof does not address the 90/180 day category in spite of Ms. Eaton's testimony that she was out of work for four months.

The court finds that the defendant's proof is insufficient to show that Ms. Eaton did not suffer a serious injury. There is no explanation for the orthopedist finding of a reduced flexion and the continuing diagnosis of cervical and lumbrosacral sprain. Furthermore, there is nothing proffered to raise an issue as to whether or not plaintiff was unable to return to work or perform her usual and customary daily activities in the 90 days immediately after the accident. As defendant has failed to meet his burden the court need not consider the adequacy of plaintiff's opposition (*Barrett v.*

Jeannot, 18 A.D.3d 679, 795 N.Y.S.2d 727). The motion is denied with respect to plaintiff, DENISE EATON.

Date: July 24, 2007

HON. PAUL J. BAISLEY, JR.

J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION