

Hearley v Temme

2007 NY Slip Op 32372(U)

August 1, 2007

Supreme Court, Albany County

Docket Number: 0008512/0051

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 ALBANY

LISA A. HEARLEY and
WILLIAM S. HEARLEY III.

Plaintiffs,

-against-

DECISION and ORDER
INDEX NO. 851-05
RJI NO. 01-06-085394

KELLY D. TEMME and
BANC ONE ACCEPTANCE CORPORATION.

Defendant.

Supreme Court Albany County All Purpose Term, May 29, 2007
Assigned to Justice Joseph C. Teresi

APPEARANCES:

Eugene Z. Grenz, Esq.
Attorney for the Plaintiffs
113 Great Oaks Office Blvd.
Western Avenue at the Northway
Albany, NY 12203

Christine J. Klein, Esq.
Attorney for the Defendant Temme
Eustace & Marquez
1311 Mamaroneck Avenue, 3rd Fl.
White Plains, NY 10605

TERESI, J.:

Defendant, Kelly D. Temme (hereinafter “Defendant” or “Ms. Temme”) seeks an Order from this Court granting her summary judgment pursuant to CPLR § 3212. Plaintiffs, Lisa Hearley and William S. Hearley III, oppose the motion.

Plaintiff commenced this action to recover damages she allegedly sustained in an

automobile accident that occurred on February 12, 2002. Plaintiff claims to have suffered chronic muscular ligamentous strain of the neck, chronic muscular strain of the back, post concussion syndrome, and chronic ligamentous strain of the shoulder as a result of this accident. In support of her claim, Plaintiff submits unsworn medical records from St. Peter's Hospital, and the offices of Dr. Vellis, and Dr. Barbaroto. This Court received notice from plaintiffs on May 31, 2007 that certifications were inadvertently omitted from their records, nevertheless, no affidavits from either plaintiff have been submitted to this date, and no further communication has been received from plaintiff on that subject.

Defendant moves for summary judgement based upon lack of a threshold injury sufficient to meet the no-fault requirements of the Insurance Law of the State of New York. Defendant submits sworn affidavits from a radiologist, Dr. John Rigney, who took an MRI of Plaintiff less than 2 months after the accident and confirmed that she suffered no serious neck injury; ruling out disc herniations or bulges in her neck. Further, Defendant submits sworn affidavits from orthopedist, Dr. Russell Cecil, who observed no objective evidence of any neck, back, or shoulder injury on Plaintiff's exam, and neurologist, Dr. Christopher Calder, who found Plaintiff to be free from any objective findings supporting neurological injury. As such, Defendant has met her prima facie burden of establishing that Plaintiff's injuries were not serious.

Plaintiff alleges a "serious injury" within the meaning of NY Insurance Law § 5102(d) (2006) based on permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body function or system; a significant limitation of use of body function or system and/or a medically determined injury or impairment of a non-permanent nature which prevented Plaintiff from performing substantially all of the material acts

constituting her usual and customary daily activities for more than 90 days out of the 180 days immediately following the accident.

NY 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.

Id. If the defendant establishes a prima facie case that the plaintiff's injuries were not serious, the burden shifts to the plaintiff to come forward with sufficient evidence to demonstrate she suffered a “serious injury.” Gaddy v. Eyler, 79 N.Y.S. 955, 991 (1992).

The Court of Appeals has stated that “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, 572 (2005). For instance, “[p]roof of a herniated disc, without additional objective medical evidence establishing that the accident resulted in significant physical limitations, is not alone sufficient to establish a serious injury.” Id. at 574. In a serious injury case where the plaintiff allegedly suffered a herniated disc as a result of an automobile accident, the Court of Appeals found that “a plaintiff who terminates therapeutic measures following the accident, while claiming ‘serious injury,’ must offer some reasonable explanation for having done so.” Id. Because the plaintiff

failed to provide such an explanation, failed to address how his kidney disease affected the injuries allegedly caused by the accident, and failed to explain whether the injuries were caused by the accident, the Court affirmed the dismissal of the plaintiff's complaint. Id. at 574-75.

Additionally, "proof of serious injury must consist of 'competent medical evidence based upon objective medical findings and tests to support [the] claim of serious injury and to connect the condition to the accident.'" Murphy v. Arrington, 295 A.D.2d 865, 867 (3d Dept. 2002) (quoting Blanchard v Wilcox, 283 AD2d 821, 822 (3d Dept. 2001)). Although proof of diagnostic tests may not be required in all cases, if no diagnostic tests are relied upon, it is essential that the affidavit reflect observable, palpable, measurable or quantifiable findings upon physical examination." Monk v. Dupuis, 287 N.Y.2d 687, 688 (3d Dept. 2001). The Third Department has "consistently recognized that a diagnosis based solely on a plaintiff's subjective complaints is insufficient for this purpose . . ." Monk v. Dupuis, 287 N.Y.2d 687, 688 (3d Dept. 2001). Finally, the Court of Appeals has ruled that unsworn physician reports are inadmissible to defeat a motion for summary judgment. Grasso v. Angerami, 79 N.Y.2d 813 (1991).

To establish that the plaintiff suffered an injury or impairment that prevented her from performing substantially all of the material acts which constitute her usual and customary daily activities, the plaintiff must demonstrate that he could not perform his customary daily activities "to a great extent rather than some slight curtailment" Licari v Elliott, 57 N.Y.2d 230, 236 (1982); see Van Norden-Lipe v. Hamilton, 294 A.D.2d 749, 749 (3d Dept. 2002).

Defendant has offered persuasive evidence, in the form of three affidavits from medical professionals, that Plaintiff suffered no serious injury from the alleged accident within the meaning of Insurance Law § 5102. Plaintiff has failed to refute Defendant's prima facie showing that Plaintiff's injuries did not satisfy the requirements to constitute "serious injury" with sufficient medical evidence. The medical records, even if they were certified, are insufficient to create a question of fact. This court still finds that Plaintiff has not supplied sufficient credible, objective medical evidence that plaintiff was unable to perform "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." NY CLS Ins § 5102(d). Therefore, the defendant's motion to dismiss Plaintiff's case is granted.

All papers, including this Decision and Order, are being returned to the attorney 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 provisions of that section respecting filing, entry and notice of entry.

So ordered.

Dated: August 1, 2007
Albany, NY


JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion for Summary Judgement containing exhibits A-E, with Verified Complaint of Eugene Z. Grenz dated, and Affirmation of Christine J. Klein with attachments thereto, dated April 12, 2007.
2. Affidavit in Opposition to Defendants' Motion by Eugene Grenz, including Exhibits A-C, dated May 1, 2007.
3. Reply Affirmation by Christine J. Klein, dated May 29, 2007.