

Prestol v Mckissock

2007 NY Slip Op 32730(U)

August 9, 2007

Supreme Court, New York County

Docket Number: 0111512/2005

Judge: Deborah A. Kaplan

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

PRESENT: HON. DEBORAH A. KAPLAN
Justice

PART 22

NORMA C. PRESTOL

INDEX NO. 111512/05

MOTION DATE _____

- v -

MOTION SEQ. NO. 002

CAROL I. MCKISSOCK, JONATHON P.
MCKISSOCK and ANGEL M. CALVO

MOTION CAL. NO. 82

The following papers, numbered 1 to 4 were read on this motion by the defendants for summary judgment to dismiss plaintiff's complaint on the ground that she did not meet the 'serious injury' threshold requirement of New York State Insurance Law § 5102(d).

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Notice of Cross-Motion — Affidavits — Exhibits ...

Answering Affidavits — Exhibits (Memo) _____

Replying Affidavits (Reply Memo) _____

PAPERS NUMBERED

1 _____

3 _____

4 SEP 04 2007

FILED

Cross-Motion: Yes No

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On July 4, 2003, at the intersection of West 155th Street and Edgecombe Avenue in Manhattan, plaintiff was a back seat passenger in the vehicle operated by defendant Angel M. Calvo when it collided with the vehicle operated by defendant Jonathon P. Mckissock and owned by Carol I.Mckissock.

Plaintiff commenced the instant action claiming, *inter alia*, that she sustained 'serious injuries' as defined by Insurance Law § 5102(d) - i.e. "permanent consequential limitation of use of a body function or system" and a "medically determined injury or impairment of a non-permanent nature which prevented [her] from performing substantially all of the material acts which constitute his usual and customary daily activities for at least 90 days during the 180 days immediately following the occurrence of the injury or impairment." The defendants now move for summary judgment dismissing the complaint on the ground that plaintiff 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, defendants seeks summary judgment on the threshold "serious injury" issue under "No-Fault threshold" issue (Insurance Law § 5102(d)), they bear 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 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).

Additionally, where the plaintiff claims serious injury under the "90/180" category of Insurance Law §5102(d), she must (1) demonstrate that her usual activities were curtailed during the requisite time period and (2) submit competent credible evidence based on objective medical findings of a medically determined injury or impairment which caused the alleged limitations in her daily activities. Toure v Avis Rent A Car Systems, *supra*; Gaddy v Eyler, *supra*.

In this case, the defendants have 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 proffer the pleadings in the action, plaintiff's verified bill of particulars, an excerpt of the plaintiff's deposition testimony, the affirmed reports of Dr. Edward M. Weiland, a board certified neurologist, Dr. Marc Brown, a radiologist, Dr. Todd B. Soifer, an orthopedist and an unaffirmed report by Dr. Andrew W. Litt. Unaffirmed medical reports are not admissible and as such will not be considered on this motion. Grasso v. Angerami, 79 N.Y.2d 813 (1991); Pagano v. Kinsbury, 182 A.D.2d 268 (2nd Dep't 1992); CPLR 2106.

Dr. Weiland, who examined the plaintiff on September 28, 2006, in addition

to reviewing her medical records, performed a number of objective tests, all of which are described in his report and all of which revealed a normal range of motion as compared to the stated norm. He concludes Prestol has a history of closed head trauma, knee contusion, cervical sprain/strain, and lumbosacral sprain which are all resolved and that plaintiff has normal neurologic functions. He finds no neurologic residual or permanency based upon her physical examination and no neurologic disability at the present time.

Dr. Brown, who performed a review of the MRI of the plaintiff's cervical spine dated August 19, 2003, states that there is "minimal age-appropriate degenerative disc disease." He concludes that the degree of degenerative change is comparable to people of the age of the claimant, and that this change is part of the normal aging process.

Dr. Soifer performed an examination of the plaintiff on February 1, 2007, where he reviewed her medical records, including, x-rays and MRIs and performed a number of objective tests, all of which are described in his report and all of which revealed a normal range of motion for her age, height and weight. He states that there was less than anticipated motion in both of her shoulders, but noted that upon revisit, the motions did increase. He found neck, low back, right shoulder and bilateral knee strains as well as the aggravation of pre-existing degenerative changes. Dr. Soifer also notes that the plaintiff went back to work a couple of weeks after the accident. The loss of range of motion in plaintiff's shoulders found by Dr. Soifer, though significant is not an injury pleaded in either the complaint nor the bill of particulars. Accordingly, it will be disregarded on this motion.

The defendants' proof entitles them to judgment as a matter of law on the threshold issue of "serious injury", thereby shifting the burden to the plaintiff.

In opposition to the motion, the plaintiff submits photographs of the vehicle driven by defendant Joseph P. McKissock, the affidavit of Dr. Ronald Lambert, a chiropractor, the report by Dr. Soifer as proffered by defendants, an affirmation of Dr. David L. Milbauer, a board certified radiologist and the deposition testimony of Angel M. Calvo, Jonathon P. McKissock, as well as her own.

Dr. Lambert, performed a physical examination of the plaintiff on July 10, 2003, December 16, 2003 and a follow-up examination on December 6, 2006. At each examination, he performed range of motion testing of the lumbar and cervical spine, where he found significant restrictions in all areas compared to the stated norms. On December 16, 2003 and again on December 6, 2006 his clinical impression was, *inter alia*, a disc bulge at C5-C6, cervical radiculopathy and internal derangement of the lumbar spine. He states that "due to the above stated injuries

that are causally related to the accident of July 4, 2003, it is clear that this plaintiff has sustained significant trauma to the cervical spine and it is felt that this patient has a significant limitation of the use of a body organ, function or system, in particular her cervical spine."

Dr. Milbauer examined the MRI of plaintiff's cervical spine dated August 19, 2003, finds a midline posterior disc bulge at the C5-6 level encroaching upon the canal, and notes that there is straightening of the cervical lordosis.

Plaintiff references the report of Dr. Sofier as proffered by defendants, arguing that his finding of restrictions of range of motion in plaintiff's shoulders constitute a 'serious injury'. As discussed above, this injury has not been pleaded and will not be considered on this motion.

Additionally, there is no dispute that plaintiff's treatment with Dr. Lambert terminated in December 2003. A gap or, more accurately, a cessation of treatment, may undermine a plaintiff's claim of serious injury under Insurance Law §5102(d). See Pommels v Perez, supra. However, unlike in Pommels where there was no explanation tendered for the total cessation of treatment, Dr. Lambert's affidavit states that he advised plaintiff to utilize a home exercise program.

For these reasons and upon the foregoing papers, it is

ORDERED that the motion of the defendants for summary judgment on the ground that plaintiff did not sustain a "serious injury" as defined by Insurance Law §5102(d) is denied; and it is further,

ORDERED that the parties are to appear for a status conference on October 23, 2007, at 9:30 a.m., at Part 22, 80 Centre Street, Room 136.

This constitutes the Decision and Order of the Court.

Dated: August 9, 2007

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Deborah Kaplan
Deborah A. KAPLAN
J.S.C.

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