

Zito v Moriarty

2007 NY Slip Op 33104(U)

September 25, 2007

Supreme Court, Nassau County

Docket Number: 0566-06/

Judge: Daniel Martin

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SHORT FORM ORDER
SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DANIEL MARTIN
Acting Supreme Court Justice

LISA ANN ZITO AND GEORGE LOPEZ.

TRIAL/IAS, PART 31
NASSAU COUNTY

Plaintiffs.

- against -

Sequence No.: 001
Index No.: 000566/06

THOMAS MORIARTY AND THOMAS
MORIARTY.

Defendants.

The following named papers have been read on this motion:

	Papers Numbered
Notice of Motion and Affidavits Annexed	X
Order to Show Cause and Affidavits Annexed	
Answering Affidavits	X
Replying Affidavits	X

Upon reading the papers submitted and due deliberation having been had herein, defendants' motion for summary judgment is hereby denied.

Plaintiff Lisa Ann Zito, allegedly suffered personal injuries as a result of an automobile accident in which the car she was driving was involved in an accident with an automobile owned by defendant Thomas Moriarity (dob November 19, 1955 and hereinafter referred to as "Moriarity the elder") and operated by defendant Thomas Moriarity (dob April 4, 1986 and hereinafter referred to as "Moriarity the younger") on March 9, 2005. Plaintiff claims to have suffered the following injuries:

"Disc bulge at C4/5 which impinges upon the thecal sac, disc herniation at C5/6 causing a ventral impression upon the thecal sac, straightening of the cervical spine, cervical sprain/strain, cervical segment dysfunction, cervicgia, aggravation and/or exacerbation of pre-existing lumbar spine condition, lumbar segment dysfunction, lumbar sprain/strain, thoracic segment dysfunction, headaches."

Defendants move for summary judgment to dismiss the complaint on the basis that plaintiff Zito did not sustain serious injuries as defined by Insurance Law §5102(d).

In order to succeed on a motion for summary judgment, the defendants must demonstrate that there are no issues of fact by the tender of evidence in admissible form. Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). In opposing a motion for summary judgment, plaintiffs must demonstrate that a genuine issue of material fact through admissible evidence. Zuckerman v. City of New York, supra. Plaintiffs must prove she sustained serious injuries as defined by Insurance Law §5102(d).

Insurance Law §5104(a) provides “[n]otwithstanding any other law, in any action by or on behalf of a covered person against another covered person for personal injuries arising out of negligence in the use or operation of a motor vehicle in this state, there shall be no right of recovery for non-economic loss, except in the case of a serious injury, or for basic economic loss.”

Insurance Law §5102(d) defines a “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 nonpermanent 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.”

In support of their motion, defendants annex the medical affirmations of Lee M. Kupersmith, M.D., an orthopedist and Maria Audrie DeJesus, M.D., a neurologist.

In his affirmation dated January 8, 2007 Dr. Kupersmith sets forth the objective tests administered on Ms. Zito at the January 8, 2007 orthopedic examination of plaintiff as well as the results and comparable norms and concludes:

“DIAGNOSES: Cervical herniated nucleus pulposus, resolved, lumbosacral sprain/strain resolved.

DEGREE OF DISABILITY: The claimant exhibits no disability at this time. She has not suffered any permanent injuries. The claimant suffered soft tissue injuries to her cervical spine and lumbosacral spine that have resolved. The claimant has reached preaccident endpoint at this time. The claimant did suffer a re-injury to a prior low back problem that she suffered from a motor vehicle accident 2002. The claimant does not require any additional treatment at this time. She does not require any additional physical therapy and/or chiropractic treatments. The claimant does not require any surgery and once again has reached preaccident endpoint. The claimant has no restrictions with regards to

activities of daily living. The claimant is currently a housewife and can do full activities as a housewife without restriction.”

In her affirmation dated January 11, 2007 Dr. DeJesus sets forth the objective tests administered on Ms. Zito at the January 11, 2007 neurological examination of plaintiff as well as the results and comparable norms and concludes:

“DIAGNOSIS:

1. Status-post cervical and lumbar spine sprain, resolved;
2. Normal neurological examination.

IMPRESSION:

Ms. Zito reports she was involved in a motor vehicle accident on March 9, 2005 as the seat belted driver. It is my professional opinion with a reasonable degree of medical certainty that she has recovered from any neurological injuries she may have sustained. Based on my examination, there is no indication of a neurological disability. It is my professional opinion that this claimant can perform all of her usual daily activities and working duties without restriction or any neurological limitations resulting from this accident.”

Where, as here, defendants have demonstrated *prima facie* entitlement to summary judgment through objective medical evidence, the burden shifts to plaintiffs to demonstrate triable issues of fact as to whether Ms. Zito suffered serious injuries through objective medical evidence. Oquendo v. New York City Transit Authority, 246 A.D.2d 635 (2nd Dep’t 1998).

Plaintiffs submit an affidavit from Brian Katz, D.C., a chiropractor. Dr. Katz examined plaintiff on June 6, 2007. In his affidavit Dr. Katz notes, *inter alia*, that Ms. Zito suffered reduced ranges of motion in both the cervical and lumbar spines and sets forth those results with the comparable norms. Overall, Dr. Katz concludes:

“Based on the history presented by the plaintiff, a review of her treatment notes, the MRI films, as well as the x-ray films performed by me in my office, it is apparent that Ms. Zito still suffers from the injuries sustained in her automobile accident of March 9, 2005, namely segmental dysfunction in the cervical region, displacement of a cervical disc herniation of disc C5-6, neuritis, segmental dysfunction in the lumbar region as well as lumbalgia. I have reviewed the reports of defendant’s consulting doctors, Dr. Lee Kupersmith and Dr. Maria DeJesus. Additionally, I have reviewed the plaintiff’s prior treatment records for her accident of November, 2001, specifically her treatment by Dr. David Levine and Dr. Gary Starkman. It is my opinion to a reasonable degree of chiropractic certainty that the above diagnosis which included a herniated disc at C5-C6... impinging on the thecal sac are all causally related to the motor vehicle accident which occurred on March 9, 2005. The foregoing conditions caused Ms. Zito to suffer from significant limitations of movement and constitute a permanent injury to her cervical and

lumbar spine.”

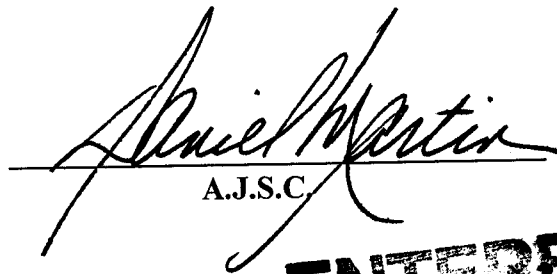
Defendants’ position that plaintiffs failed to explain the gap in treatment with Dr. Katz between June, 2005 and March, 2006 is unavailing. Such gap totaled eight months and was due to the exhaustion of Ms. Zito’s no-fault benefits. (See, affidavit of plaintiff Lisa Ann Zito). The court does not view a period of eight months in which treatment is suspended to be so onerous as to find that plaintiffs have failed to meet their burden. Compare, Pommels v. Perez, 4 N.Y.3d 566 (2005); McNeil v. Dixon, 9 A.D.3d 481 (2nd Dep’t 2004); Villalta v. Schechter, 273 A.D.2d 299 (2nd Dep’t 2000). Defendants offer no proof that such a period is so extensive as to support a finding that plaintiffs failed to meet their burden.

Where, as here, plaintiffs submit an expert’s medical affidavit which demonstrates the objective tests administered as well as how those tests support a finding that Ms. Zito has suffered a serious injury, plaintiffs have met their burden of demonstrating an issue of fact which precludes summary judgment. Steuer v. DiDunna, 233 A.D.2d 494 (2nd Dep’t 1996); Puma v. Player, 233 A.D.2d 308 (2nd Dep’t 1996); Murtha v. Kalhorn, 237 A.D.2d 496 (2nd Dep’t 1997). This is especially so when plaintiffs’ expert sets forth the loss of degrees of Ms. Zito’s range of motion. Steuer v. DiDunna, supra; Eng v. New Main Line Trading Corporation, 249 A.D.2d 359 (2nd Dep’t 1998); Pareti v. Giglietta, 221 A.D.2d 607 (2nd Dep’t 1995).

As the parties have submitted conflicting experts’ affirmations as to whether Ms. Zito suffered a serious injury as defined by the Insurance Law, an issue of fact exists which precludes summary judgment. Puma v. Player, supra; Francis v. Basic Metal, Inc., 144 A.D.2d 634 (2nd Dep’t 1988).

Defendants’ motion is therefore denied.

So Ordered.


A.J.S.C.

Dated: September 25, 2007

ENTERED

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