Thornton v Napoli

2007 NY Slip Op 33222(U)

October 3, 2007

Supreme Court, Nassau County

Docket Number: 3616-05/

Judge: Daniel R. Palmieri

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:
HON. DANIEL PALMIERI
Acting Justice Supreme Court

TRIAL TERM PART: 50

MICHELLE THORNTON,

Plaintiff,

-against-

EMANUEL V. NAPOLI,

Defendant.

INDEX NO.:013616/05

MOTION DATE:8-7-07
SUBMIT DATE:8-28-07
SEQ. NUMBER - 002

The following papers have been read on this motion:

Notice of Motion, dated 6-6-07....................1
Affirmation in Opposition, dated 8-21-07....................2
Reply Affirmation, dated 8-23-07....................3

Motion by defendant for an order pursuant to CPLR 3212 granting him summary judgment dismissing the complaint on the ground that the plaintiff did not sustain a "serious injury" as that term is defined by the Insurance Law is granted.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff in a motor vehicle accident on April 3, 2004.

Insurance Law § 5102(d) defines "serious injury" as a personal injury which results in, among other things, "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." In her bill of particulars, at paragraph "16", plaintiff alleges that she sustained all of the foregoing "serious injuries."

It is well settled that in order to satisfy the statutory serious injury threshold, a plaintiff must have sustained an injury that is identifiable by objective proof; subjective complaints of pain do not qualify as a serious injury within the meaning of Insurance Law § 5102(d). *See Toure v Avis Rent A Car Sys.*, 98 NY2d 345,350 (2002); *Scheer v Doubek*, 70 NY2d 678, 679 (1987); *Tuna v Babendererde*, 32 AD2d 574, 575 (3rd Dept. 2006). On a motion for summary judgment where the issue is whether a plaintiff has sustained a serious injury under the no-fault law, the defendant bears the initial burden of presenting competent evidence that there is no cause of action. *Browdame v Candura*, 25 AD3d 747, 748 (2nd Dept. 2006).

By submitting plaintiff's deposition transcript, and the bill of particulars, which states that she was confined to bed for one day after the accident and was confined to her home for one week, the defendant has satisfied his initial burden of establishing that plaintiff has not sustained a serious injury under the 90/180 category.

With respect to the other categories claimed, the defendant has submitted affirmed medical reports of two physicians who conducted independent medical examinations of the

plaintiff on behalf of the defendant..

On February 7, 2007, Dr. Vartkes Khachadurian performed an independent orthopedic examination of plaintiff. Range of motion testing was performed, in addition to other named testing. Range of motion results were compared to normal values. Based on his examination, Dr. Khachadurian's diagnosis was: "status post cervical sprain posttraumatic, with no clinical evidence of neuromotor deficits and no clinical evidence of herniated discs, radiculitis or radiculopathy of the upper extremities. Lumbar sprain, posttraumatic, with no clinical evidence of neuromotor deficits, radiculitis or radiculopathy. No clinical evidence of herniated discs of the lumbar spine. No evidence of radiculitis or radiculopathy of the lower extremities. Right knee sprain, posttraumatic, with no clinical evidence of internal derangement. Right knee sprain, with no clinical evidence of right ankle derangement."

On the same day, February 7, 2007, Dr. Mathew M. Chachko performed an independent neurological examination of plaintiff. As with Dr. Khachadurian, Dr. Chacko performed objective testing, and compared the results of that testing to what was stated to be normal. Based thereon, Dr. Chacko's impression was: "(h)istory of lumbar strain resolved from an objective neurological standpoint, history of headaches. Neurological examination at the present time does not reveal any focal neurological deficits. There are no finding consistent presents of any radiculopathy. There is no muscle weakness, reflex asymmetry, or sensory changes noted."

Based on the foregoing, the Court finds that the defendant has made out a *prima facie* showing that the plaintiff has not sustained a "serious injury" that would satisfy any of the

other categories alleged in her bill of particulars.

In opposition to this motion, plaintiff submits the deposition transcript of the plaintiff together with an affidavit; the affirmed report of Dr. Jeffrey Perry, D.O. and the MRI report and affirmation of Dr. Robert Diamond.

In his report, Dr. Perry noted as follows: "(e)xamination of the cervical spine reveals full range of motion. Geniometric measurements of the lumbar spine reveal flexion 78 degrees (normal 90 degrees), extension 24 degrees (normal 3- degrees), right rotation 37 degrees (normal 45 degrees), left rotation 36 degrees (normal 45 degrees), right lateral flexion 24 degrees (normal 30 degrees), left lateral flexion 22 degrees (normal 30 degrees). * * * Range of motion of the left ankle is full in terms of ankle dorsiflexion, ankle plantar flexion, inversion and eversion. There is a 25% loss of inversion and eversion in the right ankle and there is a 20% loss of plantar flexion and dorsiflexion. * * * Palpatory examination of the spine reveals muscle spasms, tenderness and taut bands in the paravertebral muscles. There is tenderness in the peripatella region of the right knee."

In his report dated July 18, 2007, Dr. Robert Diamond states that: "(b)ased upon my examination of the films and my experience as a radiologist, I can state with a reasonable degree of medical certainty that the MRIs showed that the plaintiff had the following: Synovial Fluid in the right ankle and L2/3 through L4/5 Posterior Disc Bulges."

Medical proof which indicates limitations in the lumbar or cervical spine is usually sufficient to raise a triable issue of fact. *See, e.g., Rosario v Universal Truck & Trailer Service, Inc.*, 7 AD3d 306 (1st Dept. 2004). However, certain factors may override a plaintiff's objective medical proof of limitations and allow dismissal of the complaint.

Pommells v Perez, 4 NY3d 566 (2005). Specifically, the Court held in *Pommells* that additional contributing factors, such as a gap in treatment, an intervening medical problem, or a pre-existing condition which would interrupt the chain of causation between the claimed accident and the claimed injury would render plaintiff's case subject to dismissal. *Id* at 566, citing *Franchini v Palmieri*, 1 NY3d 536 (2003); *see also Mohamed v Siffrain*, 19 AD3d 56 (2nd Dept. 2005).

Further, "the existence of a herniated or bulging disc is not evidence of serious injury in the absence of objective medical evidence of the extent of the alleged physical limitations resulting from the disc injury and its duration." *Albano v Onolfo,* 36 AD3d 728 (2nd Dept. 2007); *Yakubov v CG Trans Corp.*, 30 AD3d 509 (2nd Dept. 2006); *Kearse v New York City Tr. Auth.*, 16 AD3d 45 (2nd Dept. 2005). Despite the existence of Dr. Diamond's MRIs indicating disc bulges, plaintiff has failed to rebut defendant's a *prima facie* showing that plaintiff did not sustain a serious injury within the purview of Insurance Law § 5102(d) because there is no objective demonstration of a significant impairment related thereto. *Kearse v NYCTA*, *supra*..

While Dr. Perry purports to find a number of range of motion restrictions at the time of his recent examination on May 1, 2007, this documentation of range of motion restrictions is a full three years after the accident. Plaintiff has not presented sufficient medical proof that these restrictions were contemporaneous with the accident, by showing significant range of motion restrictions in the same areas of her body now claimed. *Bell v Rameau*, 29 AD3d 839 (2nd Dept. 2006); *Li v Yun*, 27 AD3d 173 (2nd Dept. 2006); *Suk Ching Yeung v Rojas*, 18 AD3d 863 (2nd Dept. 2005); *Rodriguez v Cesar*, 40 AD3d 731 (2nd Dept. 2007)). Relatedly,

there is an undisputed gap in treatment from the time of the accident until the preparation of the medical report of Dr. Perry, constituting an additional reason for dismissal. *Pommells v Perez, supra; Albano v Onolfo, supra.*

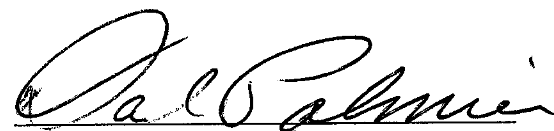
Finally, plaintiff failed to submit competent medical evidence that she was unable to perform substantially all of her daily activities for not less than 90 days of the first 180 days subsequent to the subject accident. *Albano v Onolfo, supra*; *Duran v Sequino*, 17 AD3d 626 (2nd Dept. 2005); *Sainte-Aime v Ho,* 274 AD2d 569 (2nd Dept. 2000).

In view of the foregoing, defendant's motion for summary judgment dismissing the complaint is granted.

This shall constitute the Decision and Order of this Court

ENTER

DATED: October 3, 2007



HON. DANIEL PALMIERI
Acting Supreme Court Justice

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