

Midura v Zapata

2007 NY Slip Op 33225(U)

October 3, 2007

Supreme Court, Nassau County

Docket Number: 0461-05/

Judge: Daniel R. Palmieri

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Sum

SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

Present:

**HON. DANIEL PALMIERI
Acting Justice Supreme Court**

-----x
LAURA MIDURA,

Plaintiff,

-against-

**NOEMI ZAPATA, MANUEL ZAPATA, and
DENISE SURGOT,**

Defendants
-----x

TRIAL TERM PART 50

INDEX NO.:020461/05

MOTION DATE:6-22-07

SUBMIT DATE: 9-28-07

SEQ. NUMBER - 004

The following papers have been read on this motion:

- Notice of Motion, dated 5-16-07.....1**
- Affirmation in Opposition, dated 9-20-07.....2**
- Reply Affirmation, dated 9-26-07.....3**

Motion by defendant for an order pursuant to CPLR 3212 granting 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 May 28, 2004 on the Meadowbrook Parkway in Nassau County.

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, plaintiff alleges that she sustained disc herniations at L 4-5 and L 5-S1, disc bulge at C 4-5 detached retina and floaters in her eye, all with related sequalee.

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 missed work for one day from her teaching job and 100 hours from another job and was confined to her home for four days, the defendants have satisfied their 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 defendants have submitted affirmed

medical reports of four physicians who conducted independent medical examinations of the plaintiff on behalf of the defendant.

Dr. Gorski an orthopedic surgeon reviewed plaintiff's records, conducted specific, tests with quantified results and found no objective evidence of any impairment or disability. Dr. Tan a neurologist reviewed plaintiff's medical records, conducted tests with identifiable results and found a "normal neurological examination" with fully resolved cervical and soft tissue injuries. Dr. Willig (who does not claim any specialty in his report) examined plaintiff's eyes and found them to be normal without the presence of floaters.

Based on the foregoing, the Court finds that the defendants have 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 complaint, Bill of Particulars or deposition, thus shifting the burden to the plaintiff to come forward with admissible evidence demonstrating the existence of triable issues of fact. *Toure v. Avis Rent a Car Systems Inc.*, 98 NY2d 345 (2002); *Junco v. Ranzi*, 288 AD2d 440 (2d Dept. 2001) .

In opposition to this motion, plaintiff submits her own affidavit, the affidavit and reports of radiologist Dr. Rizzuti and the affirmation, with report, of Dr. Kelman.

Dr. Rizzutti's impression is disc herniations at L 4-5 and disc bulge at C 4-5. He makes no findings as to causation and finds no other abnormalities.

Dr. Kelman conducted a single examination of plaintiff after this motion was served and also relies on the aforesaid MRI reports and on reports from plaintiff's treating doctors, Parisi and Soni. While reliance on the MRI reports is appropriate, to the extent that Dr. Kelman relies on the unsworn evidence of other doctors, his findings are not admissible

Codrington v. Ahmad, 40 AD3d 799 (2d Dept. 2007); *Vishnevsky v. Glassberg*, 29 AD3d 680 (2d Dept. 2006).

The findings of Dr. Kelman are insufficient to establish a triable issue of fact because the examination took place more than three years after the accident and there is no competent evidence which establishes plaintiff's condition contemporaneously with the accident. *Bestman v. Seymour*, 41 AD3d 629 (2d Dept. 2007).

Medical proof which indicates limitations in the lumbar or cervical spine is sometimes 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 MRIs indicating disc herniations and a bulge, plaintiff has failed to rebut defendant's *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. Kelman purports to find a number of range of motion restrictions at the time of his recent examination in August 2007, as noted above, 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. Kelman, constituting an additional reason for dismissal. *Pommells v Perez, supra; Albano v Onolfo, supra.*

Although an eye injury may cause a “serious injury” *Cf LaMana v. Jankowski*, 13 AD3d 134 (1st Dept. 2004), plaintiff has not submitted any medical evidence to support her claim of injury to any eye and the Court may not rely on the hearsay testimony in plaintiff’s deposition as to what she was told by her treating ophthalmologist. Thus, the evidence submitted by defendants’ eye examiner is un rebutted.

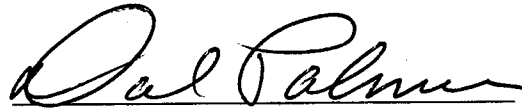
Plaintiff has failed to submit competent medical evidence that she was unable to perform substantially all of her daily activities for not less than 90 days of the first 180 days subsequent to the subject accident. *Albano v Onolfo, supra; Duran v Sequino*, 17 AD3d 626 (2nd Dept. 2005); *Sainte-Aime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

**TO: Bandel & Bandel, LLP
Attorneys for Plaintiff
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ENTERED

OCT 09 2007

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**NASSAU COUNTY
COUNTY CLERK'S OFFICE**