

Mitchell v Schelling

2007 NY Slip Op 33250(U)

October 4, 2007

Supreme Court, Suffolk County

Docket Number: 0007817/2006

Judge: Arthur G. Pitts

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 7-6-07
ADJ. DATE 8-23-07
Mot. Seq. # 001 - MG; CASEDISP
002 - XMG

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CELESTE MITCHELL, :
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 Plaintiff, :
 :
 - against - :
 :
 RACHAEL SCHELLING and GERALDINE :
 PLANZ, :
 :
 :
 Defendants. :
-----X

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Upon the following papers numbered 1 to 44 read on this motion for summary judgment ; Notice of Motion/Order to Show Cause and supporting papers 1 - 16 ; Notice of Cross Motion and supporting papers 17 - 22 ; Answering Affidavits and supporting papers 23 - 40 ; Replying Affidavits and supporting papers 41 - 44 ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendant Planz and this cross motion by defendant Schelling for summary judgment dismissing the complaint on the basis that plaintiff did not sustain a “serious injury” as defined in Insurance Law § 5102 (d) are granted.

This is an action to recover damages for serious injuries allegedly sustained by plaintiff as a result of a motor vehicle accident that occurred on Route 27A approximately 100 feet east of Mastic Road, Town of Brookhaven, New York on August 12, 2003. The accident allegedly occurred when the vehicle owned and operated by defendant Rachael Schelling collided with the vehicle owned and operated by defendant Geraldine Planz, and in which plaintiff was riding in at the time. Defendant Planz now moves and defendant Schelling cross moves for summary judgment dismissing the claims against them on the basis plaintiff did not sustain a “serious injury” as defined in Insurance Law § 5102 (d).

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."

In order to recover under the "permanent loss of use" category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (*Oberly v Bangs Ambulance Inc.*, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the "permanent consequential limitation of use of a body organ or member" or a "significant limitation of use of a body function or system" categories, either a specific percentage of the loss of range of motion must be ascribed or there must be a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (*Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 746 NYS2d 865 [2000]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]).

It is for the court to determine in the first instance whether a prima facie showing of "serious injury" has been made out (*Tipping-Cestari v Kilhenny*, 174 AD2d 663, 571 NYS2d 525 [2d Dept 1991]). The initial burden is on the defendant "to present evidence, in competent form, showing that the plaintiff has no cause of action" (*Rodriguez v Goldstein*, 182 AD2d 396, 582 NYS2d 395, 396 [1st Dept 1992]). Once defendant has met the burden, plaintiff must then, by competent proof, establish a prima facie case that such serious injury exists (*Gaddy v Eyley*, 79 NY2d 955, 582 NYS2d 990 [1992]). Such proof, in order to be in a competent or admissible form, shall consist of affidavits or affirmations (*Pagano v Kingsbury*, 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]). The proof must be viewed in a light most favorable to the nonmoving party, here, the plaintiff (*Cammarere v Villanova*, 166 AD2d 760, 562 NYS2d 808 [3d Dept 1990]).

In support of this motion, defendant Planz submits, inter alia, the complaint and her answer thereto; plaintiff's verified bill of particulars; the affirmed report and addendum report of defendant's examining orthopedist, Vartes Khachadurian, M.D.; the affirmed report of defendant's examining neurologist, Mathew M. Chacko, M.D.; the affirmed report of defendant's examining radiologist, Steven L. Mendelsohn, M.D.; and plaintiff's deposition testimony. At the outset, the Court notes that this motion is procedurally deficient to the extent that defendant has not supplied a copy of all pleadings served in this action (*see*, CPLR 3212 [b]), however, as defendant Schelling's answer has been annexed to the cross motion, the main motion has been considered.

Plaintiff claims in her bill of particulars that she sustained a decreased range of motion of the neck, back and shoulders; lumbalgia; cervicalgia; myositis; and tenderness over various body parts. Additionally, plaintiff claims that she was partially disabled from the date of the accident to the present time and continuing. Plaintiff further claims that she sustained a serious injury in the categories of a permanent loss of use, a permanent consequential limitation, a significant limitation and a non-permanent injury.

In his report dated October 20, 2006, Dr. Khachadurian states that he performed an independent orthopedic examination of plaintiff on that date, and his findings include a normal range of motion of the lumbar spine; a level pelvis; normal pinch power; negative Tinel's signs at the elbows, wrists and hands; and a negative straight leg raising test. He also noted that there was no atrophy of the lower or upper extremities, as well as no spasm/shift of the cervical or lumbar spine. Dr. Khachadurian opined that plaintiff had sustained sprains of the cervical and lumbar spine and a shoulder contusion with no evidence of an internal derangement. He also concluded that there was no evidence of an ongoing orthopedic disability. In his addendum report dated February 22, 2007, Dr. Khachadurian states that there was a normal range of motion of plaintiff's cervical spine as tested during his October 20, 2006 examination.

In his report dated October 20, 2006, Dr. Chacko states that he performed an independent neurological examination of plaintiff on that date, and his findings include a normal motor examination with no gross atrophy or fasciculations; normal cranial nerves; DTR's that were "2+" and symmetrical. While plaintiff complained of diminished touch and pinprick sensation diffusely in the right upper extremity, right lower extremity and right side of the face, no other focal sensory abnormalities were noted. Dr. Chacko opined that while there was a causal relationship between her symptoms and the accident, plaintiff was capable of performing the normal activities of her daily living and not disabled.

In his report dated September 5, 2006, Dr. Mendelsohn states that he performed an independent radiological examination of the MRI studies of plaintiff's cervical spine, and his findings include a small left paracentral focal herniation; patent neural foramina with no evidence of narrowing; no impingement of existing nerve roots; no compression deformities; and normal paracervical soft tissue structures. He opined that these studies showed a small herniation without any nerve root involvement and that the remaining cervical discs were of normal height, hydration signal and contour.

Plaintiff testified to the effect that she was riding in defendant Geraldine Planz' car at the time of the accident. Immediately afterwards, she was taken by ambulance to the emergency room at Brookhaven Memorial Hospital where she was examined and where x-rays were performed. She was later released the same day. At the time of the accident, plaintiff was on a two week school break while enrolled in a Master's program. In September 2003, she saw a chiropractor for one initial visit and then a subsequent one in January 2004, at which time she began a course of treatment for about three months. The last time she saw him was in January 2005. Sometime thereafter, plaintiff began a course of physical therapy. As a result of her injuries, she is no longer able to engage in weight lifting, yoga, or jazzercise. While plaintiff testified that she is unable to drive for long periods of time, she admitted that she has hiked, walked and gone sightseeing during several recent vacations.

In support of the cross motion, defendant Schelling submits, among other things, plaintiff's complaint and her answer thereto, as well as the affirmation of counsel which adopts the factual and legal arguments set forth in the affirmation of counsel in support of the main motion. Counsel argues that defendant Schelling should be granted partial summary judgment dismissing the claims against her on the basis that plaintiff did not sustain a serious injury as defined in Insurance Law § 5102.

By their submissions, defendants made a prima facie showing that plaintiff did not sustain a serious injury (*see, Wright v Peralta*, 26 AD3d 489, 809 NYS2d 465 [2d Dept 2006]; *Farozes v Kamran*, 22 AD3d 458, 802 NYS2d 706 [2d Dept 2005]; *Teodoro v Conway Transp. Serv.*, 19 AD3d 479, 798

NYS2d 466 [2d Dept 2005]; *Khan v Hamid*, 19 AD3d 460, 798 NYS2d 444 [2d Dept 2005]). Dr. Khachadurian found, upon a recent orthopedic examination, that plaintiff had a normal range of motion of the cervical and lumbar spine with no spasm or shift. Dr. Khachadurian opined that plaintiff had sustained sprains of the cervical and lumbar spine as well as a shoulder contusion, however, he concluded that she was not disabled. Dr. Chacko found, upon a recent neurological examination, that plaintiff had a normal motor examination with no gross atrophy or fasciculations. He also concluded plaintiff was not disabled. Additionally, Dr. Mendelsohn found, upon an independent radiological examination, that the MRI studies of plaintiff's cervical spine showed a small left paracentral focal herniation with no compression deformities and no impingement of existing nerve roots. Defendants' remaining evidence, including plaintiff's deposition testimony, also supports a finding that she did not sustain a serious injury. As defendants has met their burden as to all categories of serious injury alleged, the Court turns to plaintiff's proffer (see, *Franchini v Palmieri*, 1 NY3d 536, 775 NYS2d 232 [2003]; *Dongelewic v Marcus*, 6 AD3d 943, 774 NYS2d 841 [3d Dept 2004]).

In opposition to these motions, plaintiff submits, inter alia, the personal affirmation of plaintiff's treating physiatrist, Christopher Criscuolo, M.D. At the outset, the affirmation of Dr. Criscuolo is deficient to the extent that he attempts to rely upon the unaffirmed diagnostic reports of plaintiff's other treating physicians (see, *Olson v Russell*, 35 AD3d 684, 828 NYS2d 417 [2d Dept 2006]; *Dominguez-Gionta v Smith*, 306 AD2d 432, 761 NYS2d 310 [2d Dept 2003]). To the extent, however, that he relied upon his own observations, or the reports submitted by defendants' in support of the motion, his findings have been considered. In his affirmation, Dr. Criscuolo avers that he performed an initial physiatric examination of plaintiff on November 7, 2005 in connection with her complaints of accident-related neck, back and arm pain. He avers that he continued to treat plaintiff after that date and that she underwent trigger point injections on July 5, 2007. Dr. Criscuolo opines that plaintiff sustained, among other things, cervical sprains/strains, myalgia, lumbalgia as well as a decreased range of motion of the neck, back and shoulders. He also concluded that her injuries were causally related to the accident and that she sustained a permanent partial disability.

Plaintiff has provided insufficient medical proof to raise an issue of fact that she sustained a serious injury under the no-fault law (see, *Burke v Galli*, 242 AD2d 595, 664 NYS2d 742 [2d Dept 1997], *ly denied* 91 NY2d 806, 669 NYS2d 1 [1998]; *Furrs v Griffith*, 2007 NY Slip Op 6346 [2d Dept, Aug 7, 2007]; *Picott v Lewis*, 26 AD3d 319, 809 NYS2d 541 [2d Dept 2006]; *Paton v Weltman*, 23 AD3d 895, 804 NYS2d 129 [3d Dept 2005]). While a disc herniation may constitute a serious injury, Dr. Criscuolo's affirmation is not probative for the purposes of demonstrating a serious injury because he did not establish the extent of plaintiff's physical limitations, if any, resulting from the alleged disc injuries (see, *Yakubov v CG Trans Corp.*, 30 AD3d 509, 817 NYS2d 353 [2d Dept 2006]). While Dr. Criscuolo records plaintiff's complaints of pain, he has failed to present objective medical proof that was contemporaneous with the accident showing any initial range of motion restrictions for the affected body parts (see, *Ramirez v Parache*, 31 AD3d 415, 818 NYS2d 238 [2d Dept 2006]; *Yeung v Rojas*, 18 AD3d 863, 796 NYS2d 661 [2d Dept 2005]), or any explanation for their omission. Consequently, there is a failure of proof relating to plaintiff's claimed range-of-motion restrictions in the cervical and lumbar spine (see, *Thompson v Abbasi*, 15 AD3d 788, 788 NYS2d 48 [1st Dept 2005]). Additionally, Dr. Criscuolo's diagnosis of, among other things, cervical sprains/strains, myalgia and lumbalgia, as well as plaintiff's deposition testimony, tends to show that her injuries were merely mild, minor or slight (see, *Kivlan v Acevedo*, 17 AD3d 321, 792 NYS2d 573 [2d Dept 2005]; *Gonzalez v Green*, 24 AD3d 939, 805 NYS2d 450 [3d Dept

2005]; *Harrison v City of New York*, 2 AD3d 682, 770 NYS2d 90 [2d Dept 2003]). Further, Dr. Criscuolo's failure to furnish any specific information concerning the alleged treatment rendered to plaintiff on or after November 2005, or of the frequency and duration of said treatment, makes it clear that his report was tailored to meet the statutory requirements (*see, Barnes v Cisneros*, 15 AD3d 514, 790 NYS2d 513 [2d Dept 2005]; *Powell v Williams*, 214 AD2d 720, 625 NYS2d 634 [2d Dept 1995]). In any event, plaintiff has not provided an adequate explanation for the cessation of her treatments in September 2003 and the subsequent resumption of her medical treatment in July 2005, or the gap between her last treatments and her most recent examination by Dr. Criscuolo on July 5, 2007 (*see, Karabchievsky v Crowder*, 24 AD3d 614, 808 NYS2d 338 [2d Dept 2005]; *Puerto v Omholt*, 17 AD3d 650, 795 NYS2d 117 [2d Dept 2005]). Plaintiff's gap in treatment was, in essence, a cessation of treatment which she has failed to adequately address by way of competent medical proof (*see, Bycinthe v Kombos*, 29 AD3d 845, 815 NYS2d 693 [2d Dept 2006]; *Pimentel v Mesa*, 28 AD3d 629, 813 NYS2d 517 [2d Dept 2006]; *McNeil v Dixon*, 9 AD3d 481, 780 NYS2d 635 [2d Dept 2004]).

Plaintiff also failed to proffer any competent medical evidence that she was unable to perform substantially all of her daily activities for not less than 90 of the first 180 days subsequent to the accident (*see, Gavin v Sati*, 29 AD3d 734, 815 NYS2d 250 [2d Dept 2006]; *Mercado v Garbacz*, 16 AD3d 631, 792 NYS2d 519 [2d Dept 2005]; *Omar v Goodman*, 295 AD2d 413, 743 NYS2d 568 [2d Dept 2002]). While plaintiff claims in their bill of particulars that she was partially disabled from the date of the accident and continuing, she did not testify as to what her "customary daily activities" consisted of, or how she was allegedly curtailed (*see, Insurance Law* § 5102 [d]), nor did she submit an affidavit detailing the same (*see, Ponce v Magliulo*, 10 AD3d 644, 781 NYS2d 703 [2d Dept 2004]). Additionally, plaintiff did not submit a physician's affidavit substantiating the existence of a medically determined injury producing the alleged impairment of her activities (*see, Vishnevsky v Glassberg*, 29 AD3d 680, 815 NYS2d 152 [2d Dept 2006]; *McNeil v Dixon*, 9 AD3d 481, 780 NYS2d 635 [2d Dept 2004]). Moreover, since there is no evidence in the record demonstrating that plaintiff's alleged economic loss exceeded the statutory amount of basic economic loss, her claim in this regard must be dismissed (*see, CPLR* 3212 [b]; *see, Watford v Boolukos*, 5 AD3d 475, 772 NYS2d 566 [2d Dept 2004]; *Rulison v Zanella*, 119 AD2d 957, 501 NYS2d 487 [3d Dept 1986]). Accordingly, the motion and the cross motion are granted and the complaint is dismissed.

Dated: October 4, 2007



 J.S.C.

X FINAL DISPOSITION _____ NON-FINAL DISPOSITION