

Copeland v MTA Long Is. Bus

2007 NY Slip Op 33534(U)

October 25, 2007

Supreme Court, Nassau County

Docket Number: 7197-05/

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
VIRDIE COPELAND,

Plaintiff,

-against-

MTA LONG ISLAND BUS,

Defendant,

-----x

TRIAL TERM PART 50

INDEX NO.: 7197/05

MOTION DATE: 8-21-07

SUBMIT DATE: 9-20-07

SEQ. NUMBER - 001

The following papers have been read on this motion:

- Notice of Motion, dated 7-27-07.....1**
- Affirmation in Opposition, dated 9-7-072**
- Reply Affirmation, dated 9-18-07.....3**

This motion by defendant MTA Long Island Bus (MTA) pursuant to CPLR 3212 for summary judgment dismissing plaintiff's complaint on the ground that plaintiff failed to sustain a serious injury within the parameters of Insurance Law § 5102(d) is granted and the complaint is dismissed.

Defendant MTA seeks summary judgment dismissing the complaint in this lawsuit predicated on the contention that plaintiff did not sustain a serious injury as a result of the underlying incident, which occurred on April 13, 2004. It is alleged that the MTA bus in

which she was a passenger was involved in an accident with another vehicle in the southbound lane of Daley Boulevard, Oceanside, New York. In her bill of particulars, plaintiff alleges she sustained an array of injuries including, *inter alia*, 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 prevented her from performing substantially all of the material acts which constitute her usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury.

As the moving party for summary judgment, defendant has the initial burden of establishing a *prima facie* entitlement to judgment as a matter of law. *Hughes v Cai*, 31 AD3d 385 [2nd Dept. 2006]. In support of a claim that plaintiff has not sustained a serious injury, defendant may rely, *inter alia*, either on the sworn statements of defendant's examining physician or unsworn reports of plaintiff's examining physicians. *Mantila v Luca*, 298 AD2d 505 [2nd Dept. 2002]; *Pagano v Kingsbury*, 182 AD2d 268, 271 [2nd Dept. 1992]. It is only if defendant successfully makes the necessary showing that the burden shifts to plaintiff to proffer competent medical evidence based on objective medical findings and diagnostic tests, to support her claim or to show that there are questions of fact as to whether the purported injury is, in fact, serious within the meaning of the statute. *Flores v Leslie*, 27 AD3d 220, 221 [1st Dept. 2006].

Whether there has been a permanent injury, including whether a limitation of use

or function is significant or consequential, relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of a body part. *Toure v. Avis Rent-A-Car Sys.*, 98 NY2d 345 [2002]; *Dufel v Green*, 84 NY2d 795, 798 [1995]. In support of its motion for summary judgment addressing the categories of injuries claimed, defendant MTA has submitted, in addition to other proof discussed below, the affirmed medical reports of two physicians who examined plaintiff on February 22, 2007: Drew A. Stein, M.D. and Naunihal Sachdev Singh, M.D.

Dr. Stein states that his examination revealed normal ranges of motion in plaintiff's cervical and lumbar spines; normal bilateral straight leg raising as well as normal thoracic curvature, no midline tenderness and normal range of motion *vis a vis* plaintiff's upper extremities. He diagnosed resolved cervical, thoracic and lumbar sprain/strain with no causally related orthopedic disability. Dr. Singh, a neurologist, found no neurological disability related to the April 13, 2004 accident and noted normal ranges of motion of plaintiff's cervical and lumbar spines as well as shoulder joints. He cites a pre-existing history of surgery for scoliosis with placement of a rod when plaintiff was eighteen years of age. Dr. Stein and Dr. Singh state respectively that "there were no prior injuries to the allegedly injured areas" and that "plaintiff denied any prior history of accidents or injuries." Both physicians set forth specific numeric range of motion findings which they quantified and compared to stated norms.

Defendant also submits the narrative report of neurologist Bogdan D. Negrea, M.D. of Ocean Spine and Joint Medical Care, P.C., who examined plaintiff the day after the accident. His April 14, 2004 unsworn narrative report, which is admissible as it is introduced by defendant (*Pagano v Kingsbury, supra*), states that examination of plaintiff's lumbar spine was normal. While he notes a decreased range of motion of plaintiff's cervical spine on lateral rotation, he does not designate a specific numeric percentage of loss or attribute such loss to the accident. He concludes that the electrodiagnostic study performed on plaintiff is consistent with a left C5-C6 radiculopathy. The report of Proceso Villarica, M.D. regarding the x-ray study of plaintiff's cervical spine conducted on April 14, 2004, also included by defendant, notes degenerative joint disease present at C5-C6.

The independent radiological review of the MRI films of plaintiff's cervical spine performed by radiologist A. Robert Tantleff, M.D. on defendant's behalf, pinpoints degeneration and desiccation of the intervertebral discs from C2-3 through C5-6; discovertebral endplate spurring of opposing discovertebral endplates from C3-C4 through C6 -C7 consistent with spondylosis and longstanding chronic degenerative discogenic disc disease, processes which require years to develop. In short, Dr. Tantleff ruled out a causal relationship between the accident on April 13, 2004 and the findings of the MRI examination.

The foregoing is sufficient to establish defendant's *prima facie* entitlement to judgment as to all claims except the one predicated on the "90/180" category of serious injury. As to the latter, the plaintiff's own deposition testimony is submitted by the

movant, demonstrating that the plaintiff was able to return to essentially normal activity by the end of May, 2004, when she returned to work, which negates this claim.

Accordingly, the burden shifts to the plaintiff to set forth competent medical evidence based upon objective medical finding and diagnostic tests to support her claim. *Austin v Darindra*, 306 AD2d 234 [2nd Dept. 2003]. Plaintiff has failed to do so. She offers no explanation for her failure to disclose to her treating physicians the fact that she had been involved in two prior slip and fall accidents; that she received no treatment for the injury she suffered in the bus accident at issue after August, 2004 (*Bestman v Seymour*, 41 AD3d 629, 630 [2nd Dept. 2007]); and she returned to work within a month after said accident.

Plaintiff relies on the reports of James M. Liguori, M.D. (August 13, 2007) and Richard L. Parker, M.D. (August 20, 2007), neither of whom is identified as a treating physician, and apparently never examined her previously. The physicians examined plaintiff and prepared reports for the purpose of opposing defendant's motion. While the reports of Dr. Liguori and Dr. Parker note that plaintiff had scoliosis surgery requiring the implantation of hardware, neither addresses the relationship between plaintiff's current spinal condition and her history of scoliosis or Dr. Tantleff's findings of longstanding chronic degenerative disc disease. Nor is there any indication in either report that these physicians were aware of plaintiff's two prior slip and fall accidents which suggests that their possible effect on causation was never considered. Where, as here, plaintiff sustained injury prior to the accident giving rise to the litigation, plaintiff's expert must adequately address how plaintiff's current medical problems, in light of her past medical

history, are causally related to the subject accident. *Style v Joseph*, 32 AD3d 212, 214 [1st Dept. 2006]. In the absence of an explanation of the basis for concluding that the injury was caused by the subject accident, and not by other possible causes evidenced in the record, an expert's conclusion that plaintiff's condition is causally related to the subject accident is mere speculation insufficient to support a finding that a causal link exists. *Carter v Full Service, Inc.*, 29 AD3d 342, 344 [1st Dept. 2006], *lv to app den.* 7 NY3d 709 [2006]; *Franchini v Palmieri*, 307 AD2d 1056 [3rd Dept. 2003].

Although Dr. Parker notes restriction in the range of motion of plaintiff's lumbar and cervical spines, he makes no statement as to the causal relationship between the accident and the restricted range of motion. Inasmuch as Dr. Liguori was unaware of plaintiff's history, his conclusion that plaintiff's cervical radiculopathy secondary to disc herniation at C5-C6 and lumbosacral derangement secondary to disc bulges at L4-L5, L5-S1 resulted from the accident is purely speculative and insufficient to raise a factual issue. The unsworn MRI report of Alan S. Lubitz, M.D. regarding plaintiff's lumbar spine dated August 25, 2004, notes only the existence of central disc bulges at L4-L5 and L5-S1 but does not causally relate the condition to the accident herein. *Tudisco v James*, 28 AD3d 536, 537 [2nd Dept. 2006]. The mere existence of bulging or herniated disc is not evidence of serious injury in the absence of objective evidence of the extent of the alleged physical limitation resulting from the disc injury and its duration (*Yakubov v CG Trans Corp.*, 30 AD3d 509, 510 [2nd Dept. 2006]) and a statement of the causal connection between the condition and the accident.

Under the circumstances extant, there is no competent medical evidence to


establish a causal connection between plaintiff's condition on the date Drs. Liguori and Parker examined plaintiff and the accident which occurred three years earlier. Their opinions are insufficient to raise a triable issue of fact regarding the existence of a statutory injury that can be traced to the subject accident. Relatedly, plaintiff has failed to submit any competent medical evidence to show that she was unable to perform substantially all of her daily activities for not less than 90 of the first 180 days immediately following the accident.

Accordingly, defendant's motion to dismiss the complaint pursuant to CPLR 3212 is granted and the complaint is hereby dismissed.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: October 25, 2007


HON. DANIEL PALMIERI
Acting Supreme Court Justice

ENTERED

OCT 30 2007

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**

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