Shah v Scaringella
2007 NY Slip Op 33742(U)
November 9, 2007
Supreme Court, Nassau County
Docket Number: 8117-06/
Judge: William R. LaMarca
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[* 1]

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 19

Present: HON. WILLIAM R. LaMARCA
Justice

Scan

AFSHEEN SHAH,

Plaintiff,

-against-

JOHN SCARINGELLA,

Defendant.

Motion Sequence # 1
Submitted August 24, 2007
XXX

INDEX NO: 8117/06

The following papers were read on this motion:

Notice of Motion..1
Memorandum of Law in Support...2
Affirmation in Opposition...3
Reply Affirmation...4

Defendant, JOHN SCARINGELLA, moves for an order, pursuant to CPLR §§3211 and/or 3212, granting him summary judgment dismissing the complaint on the grounds that the plaintiff did not sustain a serious injury as defined in Insurance Law § 5102(d). Plaintiff, AFSHEEN SHAH, opposes the motion, which is determined as follows:

Plaintiff commenced this action for injuries allegedly sustained in an automobile accident that occurred on January 1, 2004 at or near the intersection of Meacham Avenue and St. Elmont Street, Hempstead, New York, at approximately 11:05 A.M. Plaintiff alleges that she was driving Southbound on Meacham Avenue when defendant, traveling eastbound on St. Elmont Street, ran a stop sign and came into contact with plaintiff's

vehicle. At her deposition, plaintiff testified that defendant's vehicle made "heavy" impact with her car; that her face and chest hit the steering wheel and the air bag; that her head, neck, shoulders and back went into the seat and headrest and that her right knee and right wrist went into the dashboard (Transcript of Deposition ["T"], p. 26). Plaintiff further testified that she lost one (1) day of work and spent one (1) day in bed following the accident. (see, Exhibit "G", T pgs. 10, 68).

In her bill of particulars, plaintiff alleged that she sustained the following injuries:

- posterior bulging disc at L5-S1;
- posterior bulging disc at C4-C5;
- posterior bulging disc at C5-C6;
- acute denervation of the right C7 nerve root;
- right L5 radiculopathy;
- right C7 radiculopathy;
- post-traumatic headache;
- right shoulder arthropathy;
- right hip arthoropathy;
- acute cervical sprain;
- acute lumbar sprain;
- acute right wrist sprain;
- acute right knee sprain;
- intervertebral disc disorder with myelopathy cervical region;
- sciatica;
- thoracic neurtis (sic) or radiculitis;
- displacement of lumbar intervertebral disc;
- migraines;
- numbness of right leg.

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., Inc.*, 98 NY2d 345, 746 NYS2d 865, 774 NE2d 1197 [C.A.2002]; *Scheer v Koubek*, 70 NY2d 678, 518 NYS2d 788, 512 NE2d 309 [1987]; *Munoz v Hollingsworth*, 18 AD3d 278, 795 NYS2d 20 [1st Dept. 2005]).

[* 3]

On a motion for summary judgment where the issue is whether a plaintiff has sustained a serious injury under the no-fault law, the movant bears the initial burden of presenting competent evidence that there is no cause of action (*Hughes v Cai*, 31 AD3d 385, 818 NYS2dd 538 [2nd Dept. 2006]; *Browdame v Candura*, 25 AD3d 747, 807 NYS2d 658 [2nd Dept. 2006]). The proof must be viewed in a light most favorable to the non-movants, here the plaintiff (*Perez v Exel Logistics, Inc.*, 278 AD2d 213, 717 NYS2d 278 [2nd Dept. 2000]). If the movant satisfies that burden, the burden shifts to plaintiff to demonstrate, by the submission of objective proof of the nature and degree of the injury, that he/she sustained a serious injury or that there are questions of fact as to whether the purported injury, in fact, is serious (*Flores v Leslie*, 27 AD3d 220, 810 NYS2d 464 [1st Dept. 2006]).

In support of the motion to dismiss, defendant offers the affirmed report of Michael J. Katz, M.D., an orthopedist (Exhibit "F"), dated January 5, 2007, who examined the plaintiff on said date and reviewed her medical records and found that the plaintiff's contusions and strains were resolved. Dr. Katz concluded that plaintiff had no signs or symptoms of permanence to the musculoskeletal system due to the collision, that plaintiff was not disabled and that she was capable of conducting her activities of daily living.

Defendant also offers the affirmed report of Maria Audrie DeJesus, M.D., a neurologist (Exhibit "E"), dated December 14, 2006, who examined the plaintiff on said date and reviewed her medical records and found that the plaintiff's cervical and lumbar sprains were resolved and that, in neurological terms, plaintiff was normal and capable of performing all of her usual daily activities and working duties.

Defendant has established a *prima facie* showing that plaintiff has not sustained a serious injury within the purview of Insurance Law § 5102(d). (*See, Toure v Avis Rent A Car Systems, Inc., supra; Garces v Yip*, 16 AD3d 375, 7990 NYS2d 712 [2nd Dept. 2005]. Defendant's submission of relevant portions of the plaintiff's deposition (*Jackson v Colvert*, 24 AD3d 420, 805 NYS2d 424 [2nd Dept. 2005]; *Batista v Olivio*, 17 AD3d 494, 795 NYS2d 54 [2nd Dept. 2005]), her medical records and the affirmations of defendant's physicians is sufficient to make a *prima facie* showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5201(d). (*Paul v Trerotola*, 11 AD3d 441, 782 NYS2d 773 [2nd Dept. 2004]).

Consequently, the burden shifts to plaintiff to establish a triable issue of fact sufficient to defeat the motion. Plaintiff must now come forward with viable, valid, objective evidence to verify her complaints of pain and limitation of motion (*Farozes v Kamran*, 22 AD3d 458, 802 NYS2d 706 [2nd Dept. 2005]). Plaintiff must establish that, as a result of the motor vehicle accident, any of the alleged identified limitations of plaintiff were of a significant nature (*see, Sibrizzi v Davis*, 7 AD3d 691, 776 NYS2d 843 [2nd Dept. 2004]). Based on the record herein, plaintiff has not met her burden.

Plaintiff offers the post sworn MRI reports of Richard Silvergleid, M.D. a neuroradiologist (Exhibit "C" to affirmation in opposition), dated July 26, 2007, who reviewed the MRI film and prepared the reports of plaintiff's MRI's of the cervical spine, taken on January 13, 2004, and of the lumbar spine, taken on February 24, 2004. As to the cervical spine, Dr. Silvergleid found no disc narrowing, no herniated disc or spinal stenosis, and only "[m]inimal posterior bulging disc at C4-5 and C5-6". As to the MRI of

the lumbar spine, Dr. Silvergleid found no significant disc narrowing or degeneration, no herniated disc or spinal stenosis and only "[m]ild posterior bulging of the disc annulus at L5-S1". The mere existence of a bulging disc is not conclusive evidence of serious injury absent evidence of a related disability or restriction (*Hernandez v DIVA Cab Corp.*, 22 AD3d 722, 804 NYS2d 396 [2nd Dept. 2005]; *Albano v Onolfo,* 36 AD3d 728, 830 NYS2d 205 [2nd Dept. 2007]; *Yakubov v CG Trans Corp.*, 30 AD3d 509, 817 NYS2d 353 [2nd Dept. 2006]; *Kearse v New York City Tr. Auth.*, 16 AD3d 45, 789 NYS2d 281 [2nd Dept. 2005]). The MRI reports of Dr. Silvergleid do not causally relate the bulging discs found in plaintiff's spine with the January 1, 2004 collision.

Plaintiff also submits the affirmed report of Itzhak C. Haimovic, M.D., a neurologist, who treated plaintiff since January 5, 2004. At the initial neurological examination, Dr. Haimovic noted plaintiff's pre-existing medical history of migraine headaches with prescribed medications, and opined that plaintiff suffered from post-traumatic bilateral cervical radiculopathy and cervical pain, with marked limitation of motion of the neck. In subsequent office visits, on March 22, 2004, May 7, 2004, July 16, 2004, October 8, 2004, January 7, 2005, January 27, 2005, April 8, 2005, April 28, 2005, June 17, 2005, July 12, 2005, August 12, 2005, October 14, 2005, February 13, 2006, March 20, 2006, June 19, 2006, October 23, 2006, January 22, 2007, May 21, 2007 and June 25, 2007, Dr. Haimovic described his continuous treatment of plaintiff for ongoing migraine headache pain, intermittent neck and lower back pain, and occasionally noted improvement in plaintiff's range of motion and "unremarkable" neurologic examinations. Occasionally, he noted plaintiff's complaints of increased pain to her right hip and buttock and decreased range

of motion to her right shoulder. In the Addendum to his report, dated, August 9, 2007, (see Exhibit "B", following the July 16, 2007 report annexed to plaintiff's motion), Dr. Haimovic has supplied percentage amounts of rotation without setting forth the norms for range of motion. (*See, De Luca v Miceli*, 37 AD3d 643, 830 NYS2d 331 [2nd Dept. 2007]). Failure to recite specific quantified findings and standards renders the same insufficient to support summary judgment. *Toure v Avis Rent A Car Sys., Inc., supra.*

Furthermore, although Dr. Haimovic concludes that "the direct competent cause for all of the above patient's symptoms is the accident which occurred on January 1, 2004" and that "[h]er pain is chronic and unremitting and has been so for numerous years and is indefinite and probably permanent in nature", Dr. Haimovic has not set forth what objective tests, if any, he performed on plaintiff to arrive at his conclusion. (*See, Gross v Wright*, 268 AD2d 79, 707 NYS2d 233 [2nd Dept. 2000]; *Toure v Avis Rent A Car Sys., Inc. supra; cf. Drexler v Melanson,* 301 AD2d 916, 752 NYS2d 433 [3rd Dept. 2003), or what competent medical evidence shows that the range of motion limitations in plaintiff's spine, right shoulder, right wrist, right knee and right hip are contemporaneous with the collision of January 1, 2004. (*See, Bestman v Seymour*, 41 AD3d 629, 838 NYS2d 645 [2nd Dept. 2007]; *Li v Woo Sung Yun*, 27 AD3d 624, 812 NYS2d 604 [2nd Dept. 2006]). Nor has Dr. Haimovic established with objective medical evidence that plaintiff's continuing headaches are causally related to the accident and not a pre-existing migraine condition identified at her initial examination. In this Court's view, Dr. Haimovic's conclusory report has been tailored to meet the statutory requirements and does not provide objective evidence to support his conclusion that plaintiff has suffered a serious injury as a result of the subject

accident. (*See*, *Paul v Trerotola*, *supra; Jackson v Colvert, supra; Munoz v Hollingsworth, supra*).

Plaintiff's own subjective complaints are not enough (*Garcia v Solbes*, 41 AD3d 426, 838 NYS2d 146 [2nd Dept. 2007]; *Buonaiuto v Shulberg*, 254 AD2d 384, 679 NYS2d 89 [2nd Dept. 1998]; *Grossman v Wright, supra*), nor was plaintiff's deposition testimony sufficient to show she suffered a serious injury (*Garcia v Solbes, supra; Buonaiuto v Shulberg, supra*).

Finally, any claim by plaintiff that she was unable to perform substantially all of her daily activities for not less than 90 out of 180 days as a result of the subject accident was unsupported by competent medical evidence (*Cotto v JND Concrete & Brick, Inc.*, 41 AD3d 415, 837 NYS2d 728 [2nd Dept. 2007]; *Albano v Onolfo*, *supra*; *Doran v Sequino*, 17 AD3d 626, 795 NYS2d 245 [2nd Dept. 2005]; *Sainte-Aime v Ho*, 274 AD2d 569, 712 NYS2d 133 [2nd Dept. 2000]), and her deposition testimony, as noted above, indicated plaintiff lost one day from her job due to the January 1, 2004 collision.

After a careful reading of the submissions herein, it is the judgment of the Court that plaintiff has not met her burden of raising issues of fact to overcome defendants' *prima facie* showing of entitlement to summary judgment. It is therefore

ORDERED, that defendant's motion for an order granting summary judgment dismissing the complaint is granted.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: November 9, 2007

WILLIAM R. LaMARCA, J.S.C.

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ENTERED

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