

Lombardo v Lichtenberger

2007 NY Slip Op 33760(U)

November 13, 2007

Supreme Court, Nassau County

Docket Number: 4551-05/

Judge: Thomas A. Adams

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS A. ADAMS,
Acting Supreme Court Justice

TRIAL/IAS, PART 37
NASSAU COUNTY

LORI A. LOMBARDO,

Plaintiff(s),

MOTION DATE: 10/11/07

INDEX NO.: 4551/05

-against-

SEQ. NO.1

MARIA M. LICHTENBERGER,

Defendant(s)

The defendant's application, pursuant to CPLR 3212, for an award of summary judgment dismissing the plaintiff's complaint due to her failure to sustain a "serious injury" as defined by Insurance Law Section 5102(d) is determined as hereinafter provided.

This personal injury action emanates out of a July 4, 2003 motor vehicle accident. The plaintiff's September 21, 2005 bill of particulars avers, inter alia, that, as a result of the accident, she was not hospitalized, was confined to bed and/or home for only two days and lost no wages from her job as an administrative assistant (see defendant's Exhibit D, paras.6 & 7). She did, however, allegedly sustain herniated discs at C5/6 and C6/7 and L2/3, L3/4 and L4/5 (para. 5).

During a July 13, 2006 deposition, she reiterated, inter alia, that she did not go to the hospital (p. 23, L10) and lost only "a day or two" from work (p. 8, L22). She first sought medical attention the following day when she visited her family physician, Dr. Vogel (p. 25, L5). He examined her, but prescribed no medication and did not refer her to any other physician (p. 26, L6). Later that week she visited a chiropractor, Kevin Campo, whom she had already been seeing for about a year and a half (p. 27, L20). After a visit or two there (p. 32, L24), she began physical therapy at Bellmore Physical Therapy (p. 33, L17). She continued physical therapy until her no-fault benefits expired (p.34, L3).

During that period, she was referred to a radiologist for cervical and lumbar MRIs (p. 36, L18) as well as to a neurologist for an EMG (p. 37, L7). Thereafter she visited "Dr. Jones" (p. 38, L14) who likewise scheduled physical therapy which the plaintiff attended for approximately a year (p. 42, L3). After about a six month gap in treatment, she began physical therapy at Levittown Medical (p. 44, L17; p. 46, L21). At the time of the July 13, 2006 deposition, the plaintiff was attending physical therapy about once a week (p. 48, L18).

The defendant's application is premised upon the September 15, 2003 examination of an orthopedist, Anthony Cirillo, M.D., whose no-fault examination revealed full cervical and lumbar range of motion. In addition, the August 30, 2006 affirmation of another orthopedist, Isaac Cohen, M.D., avers that his contemporaneous examination, utilizing objective criteria, also found that the plaintiff's spine enjoyed full range of motion. Dr. Cohen's examination noted that MRI examinations had revealed the presence of a "small herniated disc, as well as some bulging disc[s], throughout the cervical and lumbar spine area". However, he concluded that they were degenerative rather than traumatic in origin.

The July 31, 2006 affirmation of the defendant's radiologist, Melissa Cohen, M.D., similarly avers that the plaintiff has "minimal degenerative change at the C5-C6 and C6-C7 levels" and "a disc herniation at the L5-S1 level" which is "associated with underlying degenerative changes" and therefore allegedly not traumatically related. Finally, the September 7, 2006 affirmation of the defendant's neurologist, Marie Audrie DeJesus, M.D., avers that her contemporaneous examination of the plaintiff revealed that she had incurred only a "resolved sprain/strain of the cervical, thoracic and lumbar spine".

These affirmations, when coupled with the plaintiff's deposition testimony, are sufficient to establish a prima facie entitlement to summary judgment as a matter of law by demonstrating that she did not sustain a serious injury within the meaning of Insurance Law Section 5102(d) (see Toure v Avis Rent A Car Sys., 98 NY2d 345; Albano v Onolfo, 36 AD3d 728).

In opposition, the plaintiff has failed to establish a triable issue of fact. The September 4, 2007 affirmation of Nizarali Visram, M.D., notes a recent restriction in the plaintiff's cervical and lumbar range of motion but fails "to proffer any evidence establishing that the plaintiff sustained any range of motion restrictions in those regions of her spine roughly contemporaneous with the subject accident" (Morales v Daves, ___ AD3d ___ [2nd Dept; September 25, 2007]; see Borgella v D & L Taxi Corp., 38 AD3d 701, 702). Moreover, Dr. Visram "failed to address the finding of [Dr. Cohen] attributing the condition of the plaintiff's cervical and lumbar spine to degenerative changes" (Abreu v Bushwick Building Products & Supplies, LLC, ___ AD3d ___ [2nd Dept; September 25, 2007]; see Phillips v Zilinsky, 39 AD3d 728, 729).

The July 14, 2003 and August 25, 2003 affirmations of Sima Anand, M.D. are also of no probative value since they are not based upon recent examinations of the plaintiff (see Ranzie v Abdul-Massih, 28 AD3d 447). Lastly, the July 25, 2003 (lumbar) and August 1, 2003 (cervical) reports of Samuel Mayerfield, M.D., who conducted the plaintiff's MRI examinations, are unsworn. In any event, he expresses no opinion as to whether the findings are causally related to the July 4, 2003 accident (see Albano supra at 729). The law is well settled that "the mere existence of a bulging or herniated disc is not evidence of a serious injury in the absence of objective medical evidence of the alleged physical limitations resulting from the disc injury and its duration" (Umanzor v Pineda, 39 AD3d 539). The plaintiff also failed to present competent medical evidence that she was unable to perform substantially all of her normal activities for not less than 90 of the first 180 days subsequent to the accident (see Doyaga v Teleeba, Inc., 35 AD3d 798; Albano supra at 729). Indeed, she admittedly missed only two days from work and is not seeking compensation for any lost wages.

Accordingly, the defendant's application, pursuant to CPLR 3212, for an award of summary judgment dismissing the plaintiff's

complaint due to her failure to sustain a serious injury within the meaning of Insurance Law Section 5102(d) is granted.

Dated: 11-13-07

Thomas A Adams

A.J.S.C.

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