

Nolasco v Celestine Taxi Inc.

2007 NY Slip Op 33836(U)

November 19, 2007

Supreme Court, New York County

Docket Number: 0111864/2005

Judge: Deborah A. Kaplan

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. DEBORAH A. KAPLAN
Justice

PART 22

ALMA NOLASCO

INDEX NO. 111864/2005

- v -

MOTION DATE _____

CELESTINE TAXI INC., WAHID ZAMAN,
MASS. ELEC. CONSTRUCTION CO.
and ROZMENE MAKHANI

MOTION SEQ. NO. 002
~~002/003/004~~

MOTION CAL. NO. 50 75

The following papers, numbered 1 to _____ were read on these motions for summary judgment.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits (Memo) _____
Replying Affidavits (Reply Memo) _____

PAPERS NUMBERED

Cross-Motion: Yes No

The motion of defendants Celestine Taxi, Inc. and Wahid Zaman for summary judgment dismissing the complaint on the ground that the plaintiff did not sustain a "serious injury" as defined by Insurance Law § 5102(d), and the cross-motion by defendants Mass. Electric Construction Co. for the same relief are both granted, and complaint is dismissed in its entirety, in accordance with the attached Decision. The motion of defendants Celestine Taxi, Inc. and Wahid Zaman for summary judgment on the issue of liability is denied as moot.

This constitutes the Decision and Order of the Court.

Dated: November 19, 2007

NOV 19 2007

Deborah Kaplan

Deborah A. Kaplan J.S.C.

DEBORAH A. KAPLAN

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 22

-----X

ALMA NOLASCO,

Plaintiff,

Index No. 111864/05

-against-

CELESTINE TAXI, INC., WAHID ZAMAN, MASS.
ELECTRIC CONSTRUCTION CO. and ROZMENE
MAKHANI,

Defendants.

-----X

Deborah A. Kaplan, J.:

In this action to recover damages for injuries allegedly sustained in a motor vehicle accident, the following motions are now before the court: (1) a motion by defendants Celestine Taxi, Inc. and Wahid Zaman (Zaman) (together, Celestine) for summary judgment dismissing the complaint, on the ground that plaintiff does not meet the criteria for a "serious injury" under Insurance Law § 5201 (d) (mot. seq. no. 002); (2) a motion by defendants Mass Electric Construction Co. (Mass. Electric) and Rozmene Makhani (Makhani) for the same relief, also based on Insurance Law § 5102 (d) (mot. seq. no. 003); and (3) another motion brought by Celestine for summary judgment dismissing the complaint, on the ground that there are no questions of fact concerning Celestine's lack of liability in the accident. On this motion, Celestine also requests that the court grant

Celestine permission to make that summary judgment motion after the time to do so has elapsed (mot. seq. no. 004).

On May 11, 2005, plaintiff Alma Nolasco, a back-seat passenger in a taxi cab owned by Celestine, and driven by Zaman, was injured in an accident involving a vehicle driven by Makhani, and owned by Mass. Electric. The accident occurred on 79th Street at or near its intersection with Central Park West, in Manhattan.

Plaintiff was taken to St. Luke's Roosevelt Hospital by ambulance. Complaining of pain in her "neck, lower back, head, face, right shoulder and left knee" (Plaintiff's Aff., ¶ 2), plaintiff went for treatment to Dr. Joyce Goldenberg, commencing the day after the accident. Dr. Goldenberg is Board Certified in Physical Medicine and Rehabilitation by the State of New York, and works at Central Park Physical Medicine and Rehabilitation, P.C.

Plaintiff made 40 visits to Dr. Goldenberg in 2005, undergoing various kinds of treatments related to her injury. Her last visit before 2007 occurred on October 19, 2005. On July 28, 2005, plaintiff was seen by an orthopedic surgeon, Dr. Leon Popovitz, for evaluation of her left shoulder. On the advice of Dr. Popovitz, plaintiff underwent arthroscopic surgery to her left shoulder on August 24, 2005, apparently to repair a tear in the anterior and posterior lips of the glenoid labrum.

Plaintiff returned to Dr. Goldenberg on February 15, 2007, for reevaluation. In Dr. Goldenberg's affirmed report, dated March 30, 2007, Dr. Goldenberg recorded plaintiff's chief complaints as "[c]onstant pain in the left shoulder with weakness and stiffness, Constant low back pain with stiffness. The pain radiated across her hips, Dull neck pain with stiffness. The pain radiated to the left shoulder, Left pain weakness." Aff. in Opp. to Mot., Aff. of Dr, Goldenberg, unnumbered page 2. As a result, plaintiff complained that

she cannot reach for high things on a shelf due to left shoulder pain, depression due to pain and debility, She needed assistance with heavy household chores, decreased sexual relations due to low back pain, Difficulty with prolonged walking, standing, sitting, bending, twisting, driving, sleeping, upon carrying-lifting-pushing-pulling heavy objects, upon raising from a chair or bed, when walking up or down stairs.

Id.

The movants in both of the motions based on Insurance Law § 5102 (d) claim that plaintiff cannot establish that she suffered a "serious injury" under the statute, sufficient to allow her to continue her suit at law. Insurance Law § 5102 (d) defines "serious injury" as:

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.

As in any summary judgment motion, the moving defendant in a "serious injury" case must establish a prima facie right to judgment "by submitting evidence demonstrating that plaintiff did not sustain a serious injury arising from a car accident."

Thompson v Abbasi, 15 AD3d 95, 96 (1st Dept 2005). This may be accomplished through the submission of an affidavit of a doctor who examined the plaintiff, and reached a conclusion that no serious injury occurred. See *Gaddy v Eyler*, 79 NY2d 955 (1992). The burden then shifts to the plaintiff "to come forward with sufficient evidence to overcome defendant's motion by demonstrating that she sustained a serious injury within the meaning of the No-Fault Law." *Id.* at 957.

Plaintiff's claim to have sustained a "serious injury" is apparently based on the parts of Insurance Law § 5102 (d) which define a serious injury as a "permanent consequential limitation of use of a body organ or member" or a "significant limitation of use of a body function or system." In seeking to defeat such a claim, defendants produce the reports of several doctors who examined plaintiff on defendants' behalf. The essence of the reports is that plaintiff has made a full recovery from her alleged injuries; that her complaints are only subjective in nature, and thus, insufficient to support the present action; and

that any deficit for which there is some objective evidence, such as plaintiff's alleged lower back pain at the L5/S1 level, is due to causes unrelated to the 2005 accident. Defendants' presentation, as set forth below, is sufficient to make a prima facie case that plaintiff has not sustained a serious injury.

Initially, defendants produce reports concerning injuries which plaintiff suffered in an earlier accident, in 2002. Defendants note that plaintiff complained of injuries in 2002 which are similar to those purportedly suffered in the present accident, especially as to her claims of pain and limitation in her neck, back and left shoulder. See Celestine's Notice of Motion, Ex. DD, Report of Dr. Isandr Dumesh; *id.*, Ex. AA.

Movants rely on reports generated by an array of doctors who examined plaintiff at defendants' request. First, they produce the report of Dr. Herbert Sherry, an orthopedic surgeon. *Id.*, Ex. W. Dr. Sherry examined plaintiff on March 15, 2007. In his report, he notes that, according to plaintiff's medical records, plaintiff had an MRI examination of her left shoulder on June 15, 2005 "which reportedly showed a tear of the glenoid labrum and joint effusion." *Id.* at 3. After extensive documentation of his findings, Dr. Sherry concluded that "[p]hysical examination in our office reveals an excellent clinical result from the patient's arthroscopic surgery performed on her left shoulder which has healed without residual." *Id.* at 4.

Next, defendants produce the report of Dr. Roger Bonomo, a neurologist, who examined plaintiff on March 16, 2007. *Id.*, Ex. X. After review of plaintiff's medical history since her 2002 accident, Dr. Bonomo concludes that:

[t]his history and her normal neurological exam are consistent with resolved forehead hematoma and neck strain. There is no objective evidence of radiculopathy in the neck or lower back. The reported radiographic findings of degenerative changes in lumbar spine are not the cause of any symptoms or the effect of any specific trauma. The reported EDS findings do not correlate with clinical or radiographic findings and should be disregarded. There is no documentation of left shoulder trauma in records of either MVA. There is no disability.

Id. at 4.

Doctor Lewis Rothman, who reviewed plaintiff's X-rays, CT scans and MRIs from both 2002 and 2005, claims that they indicated mostly normal findings, but noted evidence on the 2002 MRI "of chronic degenerative disease involving L5/S1 level. This is manifest by disk desiccation. There is a superimposed disk herniation at that level as described above." He noted that this condition remained "essentially unchanged" by the time of the 2005 MRI. *Id.*, Ex. Y, at 2. Dr. Rothman found, with regard to the 2005 MRI of plaintiff's left shoulder, that "[t]here is evidence of minimal tendonitis involving the supraspinatus tendon. The examination is otherwise unremarkable." In a earlier MRI, taken on June 15, 2005, Dr. Rothman's impression was that the MRI was "normal." *Id.* His final conclusion was that

"there was no evidence of abnormality involving the cervical spine, lumbar spine or left shoulder that can be related to an injury that occurred on or about May 11, 2005." *Id.*

Further review of plaintiff's radiologic films by Dr. Howard Hirsh (*id.*, Ex. H), including her MRI from June 2005, showed that there was "[d]isk degeneration, spondylosis and retrolisthesis at L5 on S1. Chronic disk-ridge complex at L5-S1 is clearly longstanding and degenerative in nature, developing over many years. There are no post-traumatic changes noted, and nothing that should be considered causally related to the incident of 5/11/05 [emphasis in original]." *Id.* at 1.

Dr. Gregory Montalbano conducted an orthopedic examination of plaintiff on July 7, 2006. After taking plaintiff's history, and after extensive examination, and review of the report of Dr. Hirsch, Dr. Montalbano concluded that, in his opinion, plaintiff "suffered from a left shoulder 'impingement syndrome' as described by Dr. Hirsch which is a congenital/degenerative condition in nature and is not a result of an acute injury and therefore in my opinion was not caused by the accident." *Id.*, Ex. N, at 2. As to plaintiff's lower back pain, and in light of the July 2005 MRI, as read by Dr. Hirsch, Dr. Montalbano concluded, as had Dr. Hirsch, that the "clinical examination of the lumbar spine today shows no significant objective abnormalities with full axial range of motion, no muscle spasm

and no neurological abnormalities," and that any "wear and tear" of the area was caused by plaintiff's occupation as a dancer. *Id.* at 3.

Finally, Dr. Edward M. Weiland, a neurologist, examined plaintiff on May 25, 2006. He noted that plaintiff complained of lower back pain, and pain in her left shoulder "with weight bearing maneuvers." *Id.*, Ex K, at 2. He discerned, among other observations, that plaintiff had full range of motion of the neck and both shoulders. After an extensive examination, Dr. Weiland's "impression" was that plaintiff's head trauma, cervical sprain, lumbosacral sprain were all resolved, and that her neurological examination was "normal." *Id.* at 3. He concluded that he found no neurological defects, and that "I see no reason why the claimant should not be able to perform activities of daily living and continue gainful employment activities, without restrictions, from a neurological perspective, based upon the physical examination findings noted today." *Id.* He found that she had no neurological residual of permanent disability at that time. *Id.*

The Court of Appeals has stated, in *Licari v Elliott* (57 NY2d 230, 236 [1982]), that "[t]here can be little doubt that the purpose of enacting an objective verbal definition of serious injury was to significantly reduce the number of automobile personal injury accident cases litigated in the courts, and

thereby help contain the no-fault premium [internal quotation marks and citation omitted]." See also *Scheer v Koubek*, 70 NY2d 678 (1987); *Lopez v Senatore*, 65 NY2d 1017 (1985). To further this goal, the Court of Appeals has determined that there must be objective proof of a plaintiff's injury, and that "subjective complaints alone are not sufficient." *Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 351 (2002). However, "[a]n expert's qualitative assessment of a plaintiff's condition also may suffice, provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system [emphasis in original]." *Id.* "Whether [plaintiff] can demonstrate the existence of a compensable serious injury depends on the quality, quantity and credibility of admissible evidence." *Manrique v Warshaw Woolen Associates, Inc.*, 297 AD2d 519, 520 (1st Dept 2002).

Plaintiff relies solely on the 2007 report of Dr. Goldenberg. Although a plaintiff's doctor's reliance on unsworn medical reports or tests, prepared by other doctors, is usually insufficient (*Cotto v JND Concrete & Brick, Inc.*, 41 AD3d 415 [2d Dept 2007]; *Thompson v Abbasi*, 15 AD3d 95, *supra*), Dr. Goldenberg properly relies on the CT scans, X-rays and MRIs which plaintiff has had over the years, because the results of these reports were utilized by defendants' examining doctors. *Gibson v Tordoya*,

___AD3d___, 2007 WL 3209614 (2d Dept 2007).

Nevertheless, plaintiff's evidence is insufficient to evade dismissal of her complaint, because her evidence is "limited to conclusory assertions tailored to meet statutory requirements." *Lopez v Senatore*, 65 NY2d at 1019. Her doctor's report merely recounts plaintiff's subjective complaints, and offers the conclusory diagnosis that the plaintiff has limitations due to pain and stiffness. Her prognosis is that these problems will persist, and that plaintiff's loss of use in her spine and left shoulder is permanent. Although the report contains a list of range of motion tests, Dr. Goldenberg does not discuss their significance, if any, and the presentation is inadequate. See *Bandoian v Bernstein*, 254 AD2d 205 (1st Dept 1998). The matter of the similarities between the injuries allegedly sustained in 2002, and those allegedly sustained in 2005, is nowhere addressed.

Nor does Dr. Goldenberg or plaintiff explain the gap in plaintiff's treatment between 2005 and 2007. Such an unexplained gap can be held against a plaintiff claiming to have sustained a serious injury. *Id.* "While a cessation of treatment is not dispositive -- the law surely does not require a record of needless treatment in order to survive summary judgment -- a plaintiff who terminates therapeutic measures following the accident, while claiming 'serious injury,' must offer some

reasonable explanation for having done so." *Pommells v Perez*, 4 NY3d 566, 574 (2005). Although plaintiff's attorney relates that plaintiff could no longer afford treatment after 2005, his allegations of fact are not probative (see *Guzman v Mike's Pipe Yard*, 35 AD3d 266 [1st Dept 2006]), and plaintiff, in her affidavit, fails to address the matter. In short, plaintiff fails to offer admissible proof that she sustained either a "permanent consequential limitation of use of a body organ or member" or a "significant limitation of use of a body function or system." Defendants' motions based on Insurance Law § 5102 (d) are granted.

Because the action must be dismissed due to plaintiff's failure to produce evidence of a serious injury, Celestine's tardy motion to dismiss the complaint based on its alleged lack of liability need not be addressed, and is denied as moot.

Accordingly, it is

ORDERED that the motion of defendants Celestine Taxi., Inc. and Wahid Zaman for summary judgment dismissing the complaint (mot. seq, no. 002) is granted, with costs and disbursements to these defendants as taxed by the Clerk of the Court, upon submission of an appropriate bill of costs; and it is further

ORDERED that the motion brought by defendants Mass. Electric Construction Co. and Rozmene Makhani for summary judgment dismissing the complaint (mot. seq. no. 003) is granted, with

costs and disbursements to these defendants as taxed by the Clerk, upon submission of an appropriate bill of costs; and it is further

ORDERED that the second motion brought by defendants Celestine Taxi., Inc. and Wahid Zaman for summary judgment dismissing the complaint (mot. seq. no. 004) on the issue of liability is denied as moot; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: November 19, 2007

ENTER:

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Deborah Kaplan

J.S.C.
DEBORAH A. KAPLAN

NOV 19 2007