

Addonizio v Olivia Transp. Corp.

2007 NY Slip Op 34077(U)

December 11, 2007

Supreme Court, Nassau County

Docket Number: 2576-04/

Judge: Daniel R. Palmieri

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5/27

SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

Present:

**HON. DANIEL PALMIERI
Acting Justice Supreme Court**

-----x

ALISON ADDONIZIO,

Plaintiff,

-against-

**OLIVIA TRANSPORT CORP., PUBLIC
ADMINISTRATOR OF SUFFOLK COUNTY AS
ADMINISTRATOR OF THE STATE OF
JOHN RICCI, CAROL A. HANNAM AND
BRIAN RICHARD HANNAM,**

Defendants.

-----x

TRIAL TERM PART: 50

INDEX NO.: 012576/04

**MOTION DATE: 8-8-07
SUBMIT DATE: 11-21-07
SEQ. NUMBER - 001**

**MOTION DATE: 8-8-07
SUBMIT DATE: 11-21-07
SEQ. NUMBER - 002**

The following papers have been read on this motion:

- Notice of Motion, dated 7-6-07..... 1**
- Notice of Cross Motion, dated 7-13-07..... 2**
- Affirmation in Opposition, dated 10-16-07..... 3**
- Affirmation in Reply, dated 11-19-07..... 4**

Motion by defendants Carol A. Hannam and Brian Richard Hannam for summary judgment dismissing the complaint is granted. Motion by defendants Olivia Transportation Corp. and Estate of John Ricci (incorrectly denominatd a cross-moston) for summary judgment dismissing the complaint is granted.

This is an action for personal injury arising from a motor vehicle accident. On January 3, 2004 at approximately 12:50 a.m., plaintiff Alison Addonizio, a 22-year old woman, was traveling eastbound on Hempstead Turnpike in Uniondale. Plaintiff stopped at the intersection with Gilroy Avenue, preparing to make a right hand turn, but was unable to proceed because there was a taxicab blocking the street. The taxi was driven by defendant John Ricci and owned by defendant Olivia Transportation Corp. As plaintiff was waiting for the taxi to clear the intersection, she was hit in the rear by a vehicle driven by defendant Brian Hannam and owned by defendant Carol Hannam.

After the accident, plaintiff called her parents, who came to the scene and took her to North Shore Glen Cove Hospital. At the hospital, plaintiff complained of pain in her neck, back, and left knee. After X-rays were taken and pain-killers prescribed, plaintiff was discharged from the hospital. About three weeks later, plaintiff, who was still experiencing pain in her neck, back, and knee, sought treatment from Dr. Vincent Leone, an orthopedist. Plaintiff had previously consulted Dr. Leone for a condition in her knees known as chondromalacia, an abnormal softness of the cartilage.¹ Based upon his examination, Dr. Leone's impression was that plaintiff had sustained post traumatic lumbar sprain and cervical whiplash. Dr. Leone prescribed pain medication, an anti-inflammatory, and physical therapy, and ordered an MRI to determine whether plaintiff had a cervical herniated disc.

This action was commenced on September 13, 2004. Subsequent to the commencement of the action, defendant John Ricci died. By decision of the Surrogate's

¹ See Merriam Webster's Medical Desk Dictionary.

Court, Suffolk County dated March 26, 2007, the public administrator of Suffolk County was authorized to defend the action on behalf of the estate. Pursuant to CPLR § 1015(a), the public administrator is therefore substituted for Ricci as a defendant. Defendants now move for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" within the meaning of the Insurance Law.

Plaintiff alleges that she sustained sprains to the cervical, thoracic, and lumbar areas of the spine. Plaintiff also alleges that she sustained a bilateral knee contusion and "post traumatic chondromalacia patella" of the left knee. The Court notes that in neither the complaint nor the bill of particulars does plaintiff allege aggravation of a pre-existing injury. *See Behan v. Data Probe Int'l*, 213 AD2d 439 (2d Dept 1995).

Insurance Law § 5102(d) defines "serious injury" as a personal injury which results in among other things "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."

The legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries. *Dufel v. Green*, 84 NY2d 795, 798 (1995). Thus, objective proof of plaintiff's injury is required to satisfy the statutory serious injury threshold. *Toure v. Avis Rent a Car Systems*, 98 N.Y.2d 345, 350 (2002).

Subjective complaints alone are not sufficient. *Gaddy v. Eycler*, 79 NY2d 955, 957-58 (1992).

"In order to prove the extent or degree of physical limitation, an expert's designation of a numeric percentage of a plaintiff's loss of range of motion can be used to substantiate a claim of serious injury" *Toure v. Avis Rent a Car Systems*, supra, 98 N.Y.2d at 350. Whether a limitation of use or body function is "consequential" or "significant" 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 the body part". *Id.* at 353. A doctor's opinion as to the medical significance of the injury must be supported by objective medical evidence, such as an MRI or CT scan, or the observation of muscle spasms during the physical examination. *Id.* The doctor must also indicate what test, if any, was performed to induce the spasm. *Id.* at 357. A diagnosis of a bulging or herniated disc, by itself, does not constitute a serious injury. *Id.* at 353 n.4.

On a motion for summary judgment, it is defendant's burden to present a prima facie showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a matter of law. *Schultz v. Von Voight*, 86 N.Y.2d 865 (1995). If defendant makes that showing, the burden shifts to plaintiff to come forward with sufficient evidence to overcome defendants' motion by demonstrating that she sustained a serious injury under the No-Fault Law. *Gaddy v. Eycler*, 79 NY2d 955 (1992). The question of whether plaintiff suffered a serious injury is not always a question of fact which requires a jury trial. *Licari v. Elliot*, 57 N.Y.2d 230, 237 (1982). Conclusory

assertions of serious injury, including subjective complaints of pain, will not fulfill the statutory definition. However, where plaintiff submits objective evidence as to "the extent of the limitation of movement, "a factual issue will be presented". *Id* at 238-39 (emphasis in original).

In support of their motion for summary judgment, defendants Brian and Carol Hannam submit the affirmation of Dr. Jerrold Gorski, an orthopedist who examined plaintiff on February 26, 2007. Dr. Gorski found that plaintiff had full range of motion in both knees and flexion and extension of her neck were normal. Plaintiff's forward elevation of her arms was normal. Dr. Gorski further found that plaintiff's lateral bending and rotation were "70 of 80" and her rotation and abduction were normal. Dr. Gorski noted that he had reviewed Dr. Leone's report, which referred to plaintiff's "known history of bilateral chondromalacia of the knees." Dr. Gorski opined that this pre-existing condition might have been "temporarily aggravated" by the accident or by the prescribed physical therapy. In any event, Dr. Gorski found that plaintiff's present complaints were mild and that she had fully recovered from her injuries.

Defendants Olivia Transportation and the Ricci administrator rely on Dr. Gorski's report and also submit an affirmation from Dr. Stephen Newman, a neurologist who also examined plaintiff on February 26, 2007. Dr. Newman found that plaintiff's neck was supple and there were no spasms upon palpitation. Dr. Newman also failed to observe any spasms in the lumbar region. Dr. Newman further noted that plaintiff's cranial nerves were intact and her motor, or muscular, condition was normal. Based upon his examination, Dr. Newman concluded that plaintiff had not sustained any neurologic

injury or disability as a result of the motor vehicle accident.

Based upon the reports of Dr. Gorski and Dr. Newman, the Court concludes that defendants have established *prima facie* that plaintiff did not suffer a serious injury within the meaning of § 5102 of the Insurance Law. Accordingly, the burden shifts to plaintiff to demonstrate that she sustained a serious injury.

In opposition to the summary judgment motions, plaintiff submits two unsworn reports of Dr. Leone, one dated January 24 and the other February 2, 2004. The reports also fail to comply with CPLR 2106, which allows for a physician's statement, affirmed under the penalties of perjury, to be served with the same force as an affidavit. As the plaintiff's physician's unsworn medical reports are not in admissible form, they may not be considered on this summary judgment motion. *Pagano v. Kingsbury*, 182 AD2d 268, 270 (2d Dept 1992).


In any event, Dr. Leone's reports are insufficient to carry plaintiff's burden. Upon his initial examination, Dr. Leone found a restriction in the range of motion with respect to flexion, extension, rotation, and lateral tilt. However, Dr. Leone did not quantify the restriction by comparing it to a normal range. Dr. Leone's report of February 2 indicates that an MRI of plaintiff's cervical spine, which was performed on January 31, 2004, was normal. Although an MRI of the lumbar spine was performed on February 28, 2004, plaintiff has not submitted the results of that diagnostic examination. The foregoing is insufficient to raise an issue of fact as to the presence of a "serious injury". In addition, plaintiff's medical submissions are not based on a recent examination *Marziotto v Striano*, 38 AD3d 623 (2d Dept 2007).

Accordingly, the Court concludes that defendants' showing that the plaintiff did not suffer a serious injury is un rebutted. Defendants' motions for summary judgment dismissing the complaint are therefore granted.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: December 11, 2007


HON. DANIEL PALMIERI
Acting Supreme Court Justice

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ENTERED

DEC 13 2007

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**