

Lau v Arroyo

2008 NY Slip Op 30117(U)

January 2, 2008

Supreme Court, New York County

Docket Number: 0110086/2004

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

DEBBY KACHAN LAU and LINDA FONG

INDEX NO. 110086-2004

MOTION DATE 10/31/07

- v -

MOTION SEQ. NO. 003

RAULITO ARROYO

MOTION CAL. NO. _____

The following papers, numbered 1 to 3 were read on this motion to vacate court order dated February 26, 2007 and to decide defendant's motion for summary judgment (sequence number 002) on the merits.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

1

Answering Affidavits — Exhibits (Memo) _____

2

Replying Affidavits (Reply Memo) _____

3

FILED
JAN 17 2008
NEW YORK COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

This is a personal injury action arising from a motor vehicle accident which occurred on May 11, 2003 at the intersection of Delancy and Forsyth Streets in Manhattan. The plaintiffs, aver their vehicle was struck by a vehicle operated and owned by Raulito Arroyo. On February 29, 2007 defendant moved for summary judgment dismissing the complaint, contending that neither plaintiff sustained serious injury as defined by Insurance Law § 5102(d). The motion was granted on default by court order dated February 26, 2007. Plaintiff now moves to vacate the default and have the summary judgment motion decided on the merits. As defendant does not oppose vacating the default, the motion to vacate the prior default judgment is granted.

It is settled law that to prevail on a motion for summary judgment, the moving party must produce evidentiary proof in admissible form sufficient to show the absence of any material issue of fact and the right to judgment as a matter of law. See Kosson v Algaze, 84 NY2d 1019 (1995); Alvarez v Prospect Hospital, 68 NY2d 320 (1986); Winegrad v New York Univ. Med Ctr., 64 NY2d 851 (1985); Zuckerman v City of New York, 49 NY2d 557 (1980). Where, as here, a defendant seek summary judgment on the threshold "serious injury" issue under "No-Fault threshold" issue (Insurance Law § 5102[d]), they bear the initial burden of establishing the absence of a "serious injury" as a matter of law. This is because, in enacting Insurance Law §5102(d), the Legislature intended to weed out frivolous claims and limit recovery to significant injuries arising from motor vehicle accidents. See Pommells v Perez, 4 NY3d 566 (2005); Toure v Avis Rent A Car Systems, 98 NY2d 345 (2002); Licari v Elliot, 57 NY2d 230 (1982).

If the moving party makes the requisite showing, the burden then shifts to the opposing party to come forward with proof in admissible form to raise a triable issue of fact requiring a trial. See Kosson v Algaze, *supra*; Alvarez v Prospect Hospital, *supra*;

Winegrad v New York Univ. Med Ctr., *supra*; Zuckerman v City of New York, *supra*. The party opposing a motion for summary judgment on the threshold "serious injury" issue must come forward with objective proof of his injury to raise a triable issue. See Toure v Avis Rent A Car Systems, *supra*; Dufel v Green, 84 NY2d 795 (1995). Subjective complaints alone are not sufficient. See Toure v Avis Rent A Car Systems, *supra*; Gaddy v Eyer, 79 NY2d 955 (1992). However, either "an expert's designation of a numeric percentage of a plaintiff's loss of range of motion" or "an expert's qualitative assessment of a plaintiff's condition" may substantiate a claim of serious injury. See Toure v Avis Rent A Car Systems, *supra*; Dufel v Green, *supra*.

In deciding a summary judgment motion, the court must bear in mind that issue finding rather than issue determination is the key to summary judgment. See Sillman v Twentieth Century Fox Film Corp., 3 NY2d 395 (1957). Furthermore, since summary judgment is a drastic remedy which deprives a litigant of her day in court, the evidence adduced on the motion must be liberally construed in the light most favorable to the opposing party. See Kesselman v Lever House Restaurant, 29 AD3d 302 (1st Dept. 2006); Goldman v Metropolitan Life Ins. Co., 13 AD3d 289 (1st Dept. 2004).

In support of his motion the defendant proffers, the pleadings, plaintiffs' deposition testimonies and the affirmed reports of Dr. Robert April, a board certified neurologist and Dr. Sondra Pfeffer, a radiologist.

Dr. April performed an examination of Lau on June 27, 2006 and reviewed her prior medical records from East-West Medical Services. After performing objective range of motion tests, which are detailed in his report, he found that her neurological examination was normal with regard to her spine and extremities. He concludes that she exhibits a normal range of motion in all areas and finds "no objective neurological findings." Further "the accident of record did not produce any neurological diagnosis, limitation, disability or need for further intervention". Dr. April examined Fong on July 19, 2006 and also reviewed her prior medical records from East-West Medical Services. After performing objective range of motion tests, which are described in his report and which reveal normal ranges of motion compared to the norm he concludes that her examination was normal. He opines that the subject accident did not produce any "neurological diagnosis, disability, limitation or need for further treatment."

Dr. Pfeffer, who reviewed Lau's MRI study of the cervical spine taken thirty nine days after the accident found, *inter alia*, a disc bulge at C4-C5, degenerative disc disease at C4-C5 and C5-C6 and disc desiccation, disc narrowing and spondylitic spurring at C5-C6. She concludes that these findings are not casually related to the accident as alleged, but rather are conditions that pre-date the occurrence. Dr. Pfeffer, who reviewed Fong's MRI study of the cervical spine taken seventeen days after the accident found no deformities of any kind.

In opposition, the plaintiffs submit the affirmations of Dr. Eric A. Lubin, a board certified radiologist, Dr. Randolph Rosarion, and two unaffirmed medical reports by Dr. Ning Cao, which are accompanied by a certification from the "custodian of records at 136-25 37th Avenue, Suite #502 Flushing, NY 11365." The report of Dr. Cao is not admissible in itself as a business record under CPLR 4518 since it contains opinions and diagnosis and is more than a day-to-day business entry. Komar v. Showers, 227 A.D.2d 135 (1 Dept. 1996); Bronstein-Becher v. Becher, 25 A.D.3d 796 (2 Dept. 2006); Rodriguez v. Zampella, 42 A.D.2d 805 (3 Dept. 1973). However, as defendant's expert, Dr. April references the unaffirmed reports, the reports are properly before the Court. Bent v. Jackson, 15 A.D.3d 46 (1st Dept. 2005); Brown v. Achy, 9 A.D.3d 30 (1st Dept. 2004).

Dr. Cao conducted a physical examination Fong on May 21, 2003 including range of motion tests of her cervical, lumbar and thoracic spines. He found normal ranges of motion in Fong's lumbar and thoracic spine, however he found restrictions in her cervical spine, flexion decreased from 50 degrees to 30 degrees, extension decreased from 60 degrees to 0 degrees, right and left lateral flexion decreased from 40 degrees to 10 degrees and right and left rotation decreased from 80 degrees to 20 degrees. Dr. Cao diagnosed Fong with a cervical sprain and post-traumatic headache syndrome and advised her to undergo physical therapy.

Although, Dr. Cao found normal ranges of motion in Lau's thoracic spine, he also found restrictions in her right shoulder, cervical and lumbar spine. Her cervical spine flexion decreased from 50 degrees to 30 degrees, extension decreased from 60 degrees to 0 degrees, right and left lateral flexion decreased from 40 degrees to 10 degrees and right and left rotation decreased from 80 degrees to 20 degrees. Her lumbar spine flexion decreased from 90 degrees to 40 degrees, extension decreased from 30 degrees to 10 degrees, right and left lateral flexion decreased from 20 degrees to 10 degrees and right and left rotation decreased from 30 degrees to 10 degrees. He also found right shoulder limited flexion at 100 degrees, abduction at 80 degrees and internal and external rotation at 35 degrees. Dr. Cao diagnosed Lau with a right shoulder, cervical and lumbosacral sprain and advised her to undergo physical therapy. Dr. Cao's two reports do not show what tests were performed, the objective nature of the tests and that the plaintiffs' limitations were significant. See Milazzo v Gesner, 33 AD3d 317 (1st Dept. 2006); Vasquez v Reluzco, 28 AD3d 365 (1st Dept. 2006)

Dr. Rosario examined Fong on December 5, 2006, in response to the summary judgment motion. After reviewing her medical records he conducted range of motion tests, where he found some restrictions in her cervical spine. Dr. Rosario diagnosis her with a cervical spine derangement with disc bulges at C4-C5 and C5-C6. He concludes that she has suffered a permanent significant limitation of use to her cervical spine.

Dr. Rosario examined Lau on December 5, 2006 after reviewing her medical records, and conducting range of motion tests, where he found restrictions in her cervical spine, extension decreased from 75 degrees to 50 degrees, right and left lateral flexion decreased from 45 degrees to 30 degrees, right and left rotation decreased from 80 degrees to 70 degrees and flexion was normal. Her lumbar spine, flexion decreased from 60 degrees to 50 degrees, right and left lateral flexion decreased from 25 degrees to 20 degrees, extension and right and left rotation were normal. Dr. Rosario opines that she suffered a right shoulder, cervical and lumbosacral spine derangement with disc bulges at C4-C5 and C5-C6. He concludes that her injuries will result in a permanent significant limitation of use to her cervical and lumbar spine.

Dr. Rosario attributes his diagnoses to the length of time between the subject accident and his examinations, in which both plaintiffs maintained restrictions in their ranges of motion. However, Dr. Rosario fails to address the significant improvement in both plaintiffs ranges of motion from their initial examination in 2003 and his examination in 2006. In addition, his reports do not state whether the plaintiffs' limitations were significant. See Milazzo v Gesner, *supra*; Vasquez v Reluzco, *supra*.

* 4]
Dr. Lubin reviewed Fong's MRI of her cervical spines taken on May 28, 2003, where he found straightening and mild reversal of the cervical lordosis and disc bulges at C4-C5 and C5-C6. Dr. Lubin reviewed Lau's MRI of her cervical spines taken on June 19, 2003, and found, *inter alia*, disc bulges at C4-C5, C5-C6 with mild facet osteoarthropathy. Nevertheless, "proof of a herniated disc, without additional objective medical evidence establishing that the accident resulted in significant physical limitations, is not alone sufficient to establish a serious injury." See Pommels v Perez, *supra* at 574; Park v Champagne, 34 AD3d 274, 276 (1st Dept. 2006).

Of note, neither plaintiff explains their complete cessation of treatment. According to their own submissions they never sought further treatment after three months in August of 2003 and only visited Dr. Rosarion in December 2006 for an exam in response to the summary judgment motion. This gap, or more accurately, a complete stoppage of treatment, undermines the plaintiffs' claim of serious injury under Insurance Law §5102(d). See Pommels v Perez, 4 NY3d 566 (2005); Milazzo v Gesner, *supra*; Berete v Ford Motor Credit Co., 29 AD3d 452 (1st Dept. 2006); Rubenscastro v Alfaro, 29 AD3d 436 (1st Dept. 2006); Vasquez v Reluzco, *supra*; Perez v Rodriguez, 25 AD3d 506 (1st Dept. 2006); Baez v Rahamatali, 24 AD3d 256 (1st Dept. 2005); Agramonte v Marvin, 22 AD3d 322 (1st Dept. 2005). Dr. Rosarion's statements made in December 2006, that plaintiffs' treatment ended when they received the maximum benefit derived from physical therapy is unpersuasive. Dr. Rosarion was not plaintiffs' treating physician in 2003.

For these reasons, and upon the foregoing papers, it is,

ORDERED that the branch of plaintiffs' motion to vacate the Court's order dated February 26, 2007 is granted, and it is further,

ORDERED that the defendant's motion for summary judgment (sequence number 002) dismissing the complaint on the ground that the plaintiffs did not sustain "serious injury" within the meaning of Insurance Law § 5102(d) is granted; and it is further,

ORDERED that the Clerk of the Court is directed to enter judgment in favor of the defendant dismissing the complaint in its entirety, with costs and disbursements to defendant as taxed by the Clerk, and it is further,

This constitutes the Decision and Order of this Court.

Dated: January 2, 2008

Enter:

DEBORAH A. V. S. J.B.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

FILED

JAN 17 2008

COUNTY OF NEW YORK

DEBORAH A. V. S. J.B.C.