

Carr v KMO Transp. Inc.

2008 NY Slip Op 30454(U)

February 13, 2008

Supreme Court, Queens County

Docket Number: 0014741/2006

Judge: Orin R. Kitzes

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

Short Form Order

NEW YORK SUPREME COURT -QUEENS COUNTY

PRESENT: ORIN R. KITZES

PART 17

Justice

-----X

VELETA CARR and LLOYD TREVOR CARR,
Plaintiff,

Index No.: 14741/06

Motion Date: 2/6/08

Motion Cal. No.: 8

-against-

KMO TRANSPORTATION, INC. and JEAN O.
ANTOINE,

Defendants.

-----X

The following papers numbered 1 to 22 read on this motion and cross-motions by defendants and plaintiff on the counterclaim for an order granting summary judgment in their favor and dismissing the complaint, as against them, on the ground that plaintiff Veleta Carr has not sustained a serious injury within the meaning of Insurance Law §§ 5102 and 5104; and cross motion by plaintiff on the counterclaim for an order granting summary judgment in his favor on the issue of liability.

	PAPERS NUMBERED
Notice of Motion-Affirmation-Exhibits.....	1-4
Memorandum of Law.....	5
Notice of Cross-Motion-Affirmation-Exhibits.....	6-9
Notice of Cross-Motion-Affirmation-Exhibits.....	10-13
Affirmation in Partial Opposition.....	14-15
Affirmation in Opposition-Exhibits.....	16-18
Affirmation in Opposition.....	19-20
Reply Affirmation.....	21-22

Upon the foregoing papers it is ordered that the motions for an order granting summary judgment in defendants' and plaintiff on the counterclaim's favor and dismissing the complaint, as against them, on the ground that plaintiff Veleta Carr has not sustained a serious injury within the meaning of Section 5102 of the Insurance Law is granted for the following reasons:

This action stems from a motor vehicle accident that occurred on June 27, 2005, at or near the intersection of Peninsula Boulevard and Lakeview, Nassau County, New York. Plaintiff Veleta Carr was a passenger in co-plaintiff's vehicle at the time to the accident and thereafter, she commenced this action and alleged that she suffered serious injuries from this accident. Co-Plaintiff, her husband, has brought an action seeking damages for the alleged loss of Veleta Carr's services.

It is for the court in the first instance to determine whether plaintiff has established a prima facie case of sustaining a serious injury within the meaning of Insurance Law 5102 (d). See, Licari v Elliot, 57 NY2d 230,237 (1982); Armstrong v Wolfe, 133 AD2d 957,958 (3rd Dept. 1987.) The analysis of the meaning of serious injury has a long history beginning with Licari v Elliott, *supra*, and applying what could be discerned from the legislative intent, the Court of Appeals, analyzing the word "significant", wrote that "the word 'significant' as used in the statute pertaining to 'limitation of use of a body function or system' should be construed to mean something more than a minor limitation of use. We believe that a minor, mild or slight limitation of use should be classified as insignificant within the meaning of the statute" (Licari v Elliott, *supra*, at 236.) The Court of Appeals reiterated this analysis in Dufel v Green, 84 N.Y.2d 795 (1995), in which it wrote that the legislative intent of the "no-fault" legislation was to weed out frivolous claims and limit recovery to major or significant injuries.

To grant summary judgment it must clearly appear that no triable issue of fact is presented. Miceli v Purex Corp., 84 AD2d 562 (2d Dept. 1981.) Additionally, summary judgment should be granted in cases where the plaintiff's opposition is limited to "conclusory assertions tailored to meet statutory requirements" (Lopez v Senatore, 65 N.Y.2d 1017.) The court need not resolve issues of fact or determine matters of credibility, but must determine whether such issues exist. Bronson v March, 127 AD2d 810 (2d Dept. 1987.)

In support of this motion, defendants have submitted, *inter alia*, plaintiff Veleta Carr's deposition testimony and Bill of Particulars, an affirmed report of Dr. Sun, an orthopedist, who examined plaintiff on April 5, 2007, an affirmed report of Dr. Weiland, a neurologist, who examined plaintiff on April 5, 2007, and Dr. Brown, a radiologist, who reviewed MRI images of plaintiff's cervical and lumbar spine that were taken on August 22 and 29, 2005, respectively.

Plaintiff Veleta Carr's Bill of Particulars indicates that she suffered various injuries, including rotator cuff tendonitis disk herniations at C4-5, C5-6, L3-4, L4-5, and bulges at L2-3, L3-4, L4-5, and L5-S1. Doctor Sun reviewed plaintiff's medical records and performed an examination of plaintiff, at defendant's request and concluded that plaintiff had no continued disability and had resolved cervical, lumbar, and right shoulder sprain and could perform normal activities of daily living without restrictions. Doctor Weiland also reviewed plaintiff's medical records and performed an examination of plaintiff, at defendant's request and concluded that plaintiff had no neurological disability, was not in need of any additional treatment, and was capable of fully performing daily activities. Dr. Brown reviewed the MR images of the cervical and lumbar spine and did not see any traumatically induced abnormality; only age-appropriate degenerative disc degeneration.

The Court finds that defendants have submitted proof in admissible form which

establishes that plaintiff has not suffered a serious injury within the meaning of Insurance Law § 5102. Consequently, the burden shifts to the plaintiff to come forward with evidence to overcome the defendant's submissions by demonstrating a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law. *See, Gaddy v Eyler*, 79 N.Y.2d 955 [1992] ; *Greggs v Kurlan*, 290 AD2d 533 (2d Dept 2002.) Consequently, the plaintiff must present objective evidence of the injury. The mere parroting of language tailored to meet statutory requirements is insufficient (*see, Powell v Hurdle*, 214 A.D.2d 720 [2d Dept. 1995].) Further, courts have consistently held that a plaintiff's subjective claim of pain and limitation of motion must be sustained by verified objective medical findings (*see, Grossman v. Wright*, 268 A.D.2d 79 (2d Dept 2000.)) Moreover, these verified objective medical findings must be based on a recent examination of the plaintiff. *Id.* In that vein, any significant lapse of time between the cessation of the plaintiff's medical treatments after the accident and the physical examination conducted by his own expert must be adequately explained. *Id.* Therefore, in order to successfully oppose a motion for summary judgment on the issue of whether an injury is serious within the meaning of Insurance Law § 5102(d), the plaintiff's expert must submit quantitative objective findings in addition to an opinion as to the significance of the injury. *Id.* This burden has not been met by plaintiff.

In opposition, plaintiff has submitted, *inter alia*, an attorney's affirmation, her and co-plaintiffs affidavits, an affirmation of Dr. Zelefsky, dated November 14, 2007, an affirmation of Dr. Harkavy, concerning an MRI of plaintiff's lumbar spine, an affirmation of Dr. Leeds, concerning an MRI of plaintiff's cervical spine and various unsworn and uncertified reports.

Dr. Zelefsky states that he first examined plaintiff on July 1, 2005 and then again on October 23, 2007. It seems that after the examination in 2005, he noted various limitations of motion in the cervical and lumbar spine and ordered a "computerized assessment" of these limitations. There is nothing submitted that the Doctor offered an opinion in 2005 as to the cause of her limitations. Nor have plaintiffs submitted any report prepared in 2005 regarding this examination. The 2007 examination revealed various restrictions of range of motion and the Doctor viewed the MRIs that showed, *inter alia*, disc herniation and bulges and he viewed EMG, Videonystagmography, and Perception Threshold reports prepared in 2005. The Doctor concluded after this 2007 examination that plaintiff suffered permanent and consequential limitations as a result of the 2005 injury. Dr. Harkavy found plaintiff's lumbar spine had, *inter alia*, disc degeneration and disc bulging and herniation. Dr. Leeds found plaintiff's cervical spine had, *inter alia*, disc degeneration and disc bulging and herniation.

Plaintiff's proof of an attorney's affirmation is not admissible probative evidence on medical issues. *Armstrong v Wolfe*, *supra* at 958. Similarly, her own deposition testimony is not admissible probative evidence on medical issues. *Id.* Moreover, her subjective complaints of pain, unsupported by credible medical evidence, are insufficient to show serious injury.

Georgia v Ramautar, 180 AD2d 713 (2d Dept. 1992.) In this vein, Dr. Zelefsky' affirmation and report is incompetent since it fails to specifically state what objective tests were done, the manner in which they were performed and what results were obtained. *See*, Wadi v. Tepedino, 242 AD2d 327 (2d Dept. 1997.) Additionally, to the extent tests were conducted, they were subjective in nature since they relied upon plaintiff's complaints of pain. *See*, Toure v Avis, 98 NY2d 345, 357 (2002.) The references to a computer assessment test are not supported by any explanation as to what this entailed. Moreover, plaintiff has not submitted any expert's opinion that explained the significance of the findings by defendant's radiologist regarding the degenerative nature of plaintiff's injuries or their non-existence. Francis v Christopher, 302 AD2d 425 (2d Dept 2003.) Similarly, the unsworn reports and medical records are not in admissible form and are not competent to defeat summary judgment. Grasso v Angerami, 79 NY2d 813 (1991); *See*, Pagano v Kingsbury, 182 AD2d 268 (2d Dept. 1992.)

The court is also mindful of the over two year gap between plaintiff's initial visit with Dr. Zelefsky and the 2007 examination, which is unexplained and occurred after this motion was served upon plaintiffs. Dimenshteyn v Dimenshteyn, 262 AD2d 348 (2d Dept 1999.) In any event, it is significant that plaintiff has failed to submit any medical report or record in admissible form that suggests the permanency of the accident prior to 2007. In light of this, any findings of a causal connection in the 2007 report of Dr. Zelefsky based on his 2005 examination, is highly speculative, at best, and primarily consists of conclusory assertions tailored to meet statutory requirements. Lagois v. Pub. Adm'r, 303 AD2d 644 (2d Dept 2003.) Consequently, plaintiffs have failed to submit competent, objective medical evidence to establish a causal connection between Veleta Carr's alleged injuries and the subject accident. Vaughan v Baez, 305 AD2d 101 (1st Dept 2003.) Finally, plaintiffs have not shown medical evidence that Veleta Carr suffered a medically determined injury or impairment of a nonpermanent nature which prevented him from performing substantially all of the material acts which constituted his usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident. Batista v Olivo, 17 AD3d 494 (2d Dept 2005.) Accordingly, plaintiffs' submissions have failed to raise a triable issue of fact that Veleta Carr sustained a serious injury. *See*, Gaddy v Eyer, 79 NY2d 955 (1992); Malpica v Lavergne, 294 AD2d 340 (2d Dept 2002.). Consequently, defendants' motion for an order of summary judgment based on the lack of serious injury and dismissing the complaint and all counterclaims is granted. CPLR 3212. Consequently, there is no need for this court to address the cross-motion regarding liability.

Dated: February 13, 2008

.....
ORIN R. KITZES, J.S.C.