SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 17

Present: HON. WILLIAM R. LaMARCA
Justice

Scan

SAMARA YOUNG,

Plaintiff,

-against-

JERRY MOORE and MARVIN L. BROWNING,

Defendants.

Motion Sequence #1
Submitted December 7, 2007

INDEX NO: 6050/06

The following papers were read on this motion:

Notice of Motion.....1
Defendant's Memorandum of Law (Exhibit "A").....2
Affirmation in Opposition.....3
Plaintiff's Memorandum of Law in Opposition.....4

Requested Relief

Defendants, JERRY MOORE and MARVIN L. BROWNING, move for an order, pursuant to CPLR §3212 and Article 51 of the Insurance Law, granting them summary judgment dismissing the complaint of the plaintiff, SAMARA YOUNG, on the ground that the injuries alleged by the plaintiff do not satisfy the "serious injury" threshold requirement of §5102(d) of the Insurance Law of the State of New York and, as such, plaintiff has no cause of action under §5104(a) of the Insurance Law. Plaintiff opposes the motion, which is determined as follows:

Background

Plaintiff commenced this action for personal injuries allegedly sustained in an automobile collision that occurred on February 7, 2005, between 8:00 AM and 10:00 AM, on Stewart Avenue, 150 feet West of Quentin Roosevelt Blvd., Garden City, New York. At the time of the incident, plaintiff was a rear seat passenger in a taxi cab owned by defendant, JERRY MOORE (hereinafter referred to as "MOORE"), and operated by defendant, MARVIN L. BROWNING.

At her deposition, plaintiff testified that, on the day of the accident, she was picked up from her home by the cab to go to work at 1-800-Flowers in Westbury, New York. She stated that the cab was proceeding on Stewart Avenue, a road with two (2) lanes in each direction divided by a double yellow line, when the cab changed from the left lane to the right lane and then veered to the right and struck a utility pole. She stated that, at the moment of impact, the right side of her body came into contact with the right rear passenger door, that her forehead hit the glass divider between the front and back seat of the cab. She testified that she waited in the cab for 15-20 minutes and then left the cab to use the phone in a local store to call the police and, when she left the cab, she felt pain in her lower back, right knee, right hip and down the right side of her body. Defendants point out that the deposition reflects that the plaintiff did not lose income due to the incident (p. 9); that plaintiff exited the cab on her own (p. 21); that she did not lose consciousness (p. 24); that she did not require an ambulance (p. 27); that she went to work and then home (pgs. 27, 28); that the day after the incident she went to a doctor (pgs. 29, 30); that she went to the hospital for x-rays but did not receive any medication or brace (p. 30); that she went to a chiropractor, Dr. Michael Roth, three to four times a week for six to eight

months (p. 34); that she reduced her chiropractic visits to twice a week for three to four months and then to once a week, with the visits ending in June 2006 (p. 35). At the chiropractor, the plaintiff received "adjustments", heating pads, electric stimulus, and physical therapy (p. 36). Pages refer to Transcript of Plaintiff's Deposition, annexed to the moving papers as Exhibit "E".

In an affidavit annexed to the opposing papers, plaintiff states that she still has pain in her right lower back approximately 5-6 days per week and intermittent right hip pain that interferes with her ability to function. She claims that she has constant right knee pain and can no longer grocery shop, sit or stand for long periods of time or lift her godson. Plaintiff claims that she is restricted to doing part-time work. It is plaintiff's position that, because she cannot exercise, she has gained significant weight. She also contends that she is unable to help her elderly grandmother, with whom she resides, in doing household chores and that her social and recreational activities are restricted as well. She asserts that, at age 26, the accident has caused a significant limitation in her activities and that she has been told her injuries are permanent.

On April 10, 2006, plaintiff commenced the instant action for personal injuries against defendants by filing and serving the Summons and Complaint. On or about July 5, 2006, defendants interposed an Answer denying the material allegations of the complaint together with affirmative defenses. Following joinder of issue, plaintiff served a Bill of Particulars in which she alleged that she sustained the following injuries which are permanent and caused by the underlying accident:

- Lumbar radiculopathy
- Cervical radiculopathy
- Cervical spine derangement

- Lumbar spine derangement
- Partial tear of the superoposterior portion of the anterior cruciate ligament
- Right knee internal derangement
- Right knee pain
- Positive Foramina Compression test
- Positive Spurling's test
- Spinous process tenderness in cervical region C3-T1
- Spinous process tenderness in lumbar L1-L5
- Positive Jackson's test, presence of nerve root lesion
- Presence of a space-occupying lesion
- Positive Valsalva test, indicating a space occupying lesion
- Positive Nachlals, indicating a possible problem in the joint, lumbosacral or sacral iliac
- Neck pain radiating to the right upper extremity
- Lower back pain
- Acute traumatic strain/sprain of the cervical and lumbar paraspinal muscles and ligaments
- Myofascial pain syndrome.

Verified Bill of Particulars, annexed to moving papers as Exhibit "C", paragraph 11.

Upon the instant application, defendants move for summary judgment dismissing the complaint on the ground that the injuries claimed by the plaintiff fail to meet the "serious injury" threshold requirement of the No Fault Law. In support of the motion, defendants have submitted the affirmed medical reports of Patrick Dindeen, M.D., an orthopedic surgeon, dated February 6, 2007, of Dr. Warren Cohen, a neurologist, dated February 6, 2007, and of Dr. Audrey Eisenstadt, a radiologist, dated September 18, 2005. Dr. Dindeen opines, after an examination of plaintiff and a review of her medical records, that all of plaintiff's sprains and strains are resolved, that she has no need for orthopedic care and no residual or permanency of injury from the February 7, 2005 incident. After a complete neurological examination and review of plaintiff's medical records, Dr. Cohen concludes that plaintiff has no need for treatment from a neurological perspective and that plaintiff has no residual or permanency of injury from the February 7, 2005 incident. Dr. Eisenstadt's

reviewed the MRI of plaintiff's right knee, taken approximately 1 ½ months after the accident on March 21, 2005, and found only degenerative changes to plaintiff's right knee.

The Law

In viewing motions for summary judgment, it is well settled that summary judgment is a drastic remedy which may only be granted where there is no clear triable issue of fact (*see, Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131, 320 NE2d 853 [C.A. 1974]; *Mosheyev v Pilevsky*, 283 AD2d 469, 725 NYS2d 206 [2nd Dept. 2001]. Indeed, "[e]ven the color of a triable issue, forecloses the remedy" *Rudnitsky v Robbins*, 191 AD2d 488, 594 NYS2d 354 [2nd Dept. 1993]). Moreover "[i]t is axiomatic that summary judgment requires issue finding rather than issue-determination and that resolution of issues of credibility is not appropriate" (*Greco v Posillico*, 290 AD2d 532, 736 NYS2d 418 [2nd Dept. 2002]; *Judice v DeAngelo*, 272 AD2d 583, 709 NYS2d 817 [2nd Dept. 2000]; *see also S.J. Capelin Associates, Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478, 313 NE2d 776 [C.A.1974]). Further, on a motion for summary judgment, the submissions of the opposing party's pleadings must be accepted as true (*see Glover v City of New York*, 298 AD2d 428, 748 NYS2d 393 [2nd Dept. 2002]). As is often stated, the facts must be viewed in a light most favorable to the non-moving party. (See, *Mosheyev v Pilevsky*, *supra*). The burden on the moving party for summary judgment is to demonstrate a *prima facie* entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issue of fact (*Ayotte v Gervasio*, 81 NY2d 1062, 601 NYS2d 463, 619 NE2d 400 [C.A.1993]; *Drago v King*, 283 AD2d 603, 725 NYS2d 859 [2nd Dept. 2001]).

Under the "no-fault" law, in order to maintain an action for personal injury, a plaintiff must establish that a "serious injury" has been sustained. (*Licari v Elliot*, 57 NY2d 230, 455 NYS2d 570, 441 NE2d 1088 [C.A. 1982]). On the present motion, the burden rests on defendant to establish, by the submission of evidentiary proof in admissible form, that plaintiff has not suffered a "serious injury." (*Lowe v Bennett,* 122 AD2d 728, 511 NYS2d 603 [1st Dept. 1986], *affirmed,* 69 NY2d 701, 512 NYS2d 364 [1986]). When a defendant's motion is sufficient to raise the issue of whether a "serious injury" has been sustained, the burden shifts and it is then incumbent upon the plaintiff to produce *prima facie* evidence in admissible form to support the claim of serious injury. *(Licari, supra; Lopez v Senatore*, 65 NY2d 1017, 494 NYS2d 101 [1985]).

Discussion

After a careful reading of the submissions herein, it is the Court's judgment that defendants' evidence is sufficient to establish a *prima facie* case that plaintiff's injuries are "not serious" within the meaning of Insurance Law §5102(d), and, therefore, the burden shifts to plaintiff to come forward with some evidence of a "serious injury" in order to survive the motion (*Gaddy v Eyler*, 79 NY2d 955, 582 NYS2d 990, 591 NE2d 1176 [C.A. 1992]).

In opposition to the motion, plaintiff offers her own affidavit and the affirmation of Ajendra Sohal, M.D., dated October 31, 2007, the affirmation of Mohammed K. Nour, M.D., dated November 1, 2007, the sworn "affirmation" of Michael S. Roth, D.C., a chiropractor, dated November 7, 2007, and the affirmation of Dr. Robert S. Nuba, a radiologist, dated September 6, 2007. Dr. Sohal first saw plaintiff on May 11, 2006, more than a year after

the accident, and found that plaintiff had restrictions in the cervical and lumbar spines as well as an indication of a torn meniscus in the right knee. Dr. Sohal diagnosed plaintiff with cervical and lumbar radiculopathy and right knee internal derangement and, based on review of the March 21, 2005 MRI film of plaintiff's right knee, opined that further chiropractic treatment would be of little value and that plaintiff's pain and disability would be permanent without surgical intervention. Dr. Sohal stated that plaintiff was partially disabled and that her injuries were causally related to the February 7, 2005 accident.

Dr. Nour first saw plaintiff on March 11, 2005, approximately one (1) month after the accident, and found range of motion limitations to plaintiff's cervical and lumbar spines as well as impaired motion to plaintiff's right knee. He directed that plaintiff obtain an MRI of her right knee to rule out internal derangement and that she obtain physical therapy. Dr. Nour opined that plaintiff's loss of range of motion is medically significant and sufficient to interfere with the activities of daily living and are causally related to the accident of February 7, 2005.

Dr. Roth first saw plaintiff on February 8, 2005, the day after the accident, when she was complaining of sharp neck pain, right shoulder pain, mid-back tightness with muscle spasm and low back pain. Upon examination, he found that plaintiff had C4-C5 sub-luxation complex with antalgic lean to the right, as well as restricted lumbar and cervical range of motion and severe palpable muscle spasms in the cervical and lumbar spines. Dr. Roth stated plaintiff tested positive in Spurling's test for foraminal stenosis, Soto Hall test for disc herniation and Kemp's test for lumbosacral disc legion. Dr. Roth opined that plaintiff suffered a severe strain/sprain injury, that will likely interfere with her activities of daily living and which are causally related to the February 7, 2005 accident.

Dr. Nuba, in evaluating the MRI of plaintiff's right knee performed on March 21, 2005, found the MRI revealed what appeared to be a partial tear of the anterior cruciate ligament. He recommended further radiologic evaluation.

After a careful reading of the submissions herein, the Court finds that plaintiff's own subjective complaints in her sworn affidavit are not enough to show that she has sustained a serious injury. *Garcia v Solbes*, 41 AD3d 426, 838 NYS2d 146 (2nd Dept. 2007). Additionally, the MRI report of Dr. Nuba, does not properly causally relate the alleged knee injury of plaintiff with the February 7, 2005 incident. *Cf., Basmajian v Wang*, 12 AD3d 471, 785 NYS2d 468 (2nd Dept. 2004). However, the differences of opinion among the remaining medical experts as to the nature, cause and extent of plaintiff's injuries raise issues of credibility that must be resolved by a jury. *Kaplan v Gak*, 259 AD2d 736, 685 NYS2d 634 (2nd Dept. 1999). The affirmation of Dr. Sohal, the physician who examined plaintiff more than 1 ½ years after the accident and found continued restriction of movement in her cervical and lumbar spine as well as indications of a torn meniscus in the right knee, that he considered permanent and causally related to the accident, was sufficient to defeat defendants' motion for summary judgment. *Livai v Amoroso*, 239 AD2d 565, 658 NYS2d 973 (2nd Dept. 1997). Moreover, Dr. Sohal's opinion that continued chiropractic treatment would provide no benefit to plaintiff's knee, together with plaintiff's assertion that she ended her physical therapy because it was not providing her with any improvement and the insurance company stopped paying, is an adequate explanation for plaintiff's gap in treatment. *Pommells v Perez*, 4 NY3d 566, 797 NYS2d 380, 830 NE2d 278 (C.A. 2005). However, plaintiff has not submitted competent medical evidence that

she was unable to perform substantially all of her daily activities for not less than 90 days of the first 180 days subsequent to the subject accident. *Albano v Onolfo*, 36 AD3d 728, 830 NYS2d 205 (2nd Dept. 2007); *Picott v Lewis*, 26 AD3d 319, 809 NYS2d 541 (2nd Dept. 2007); *Doran v Sequino*, 17 AD3d 626, 795 NYS2d 245 (2nd Dept. 2005); *Sainte-Aime v Ho*, 274 AD2d 569, 712 NYS2d 133 (2nd Dept. 2000). Indeed, her deposition testimony indicated that plaintiff lost a few days from her job due to the February 7, 2005 incident. Based on the foregoing, it is hereby

ORDERED, that defendants' motion for an order granting summary judgment is denied, except as to the 90/180 day category of injuries.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: March 3, 2008

WILLIAM R. LaMARCA, J.S.C.

ENTERED

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