

Sedano v Allen

2008 NY Slip Op 31591(U)

May 29, 2008

Supreme Court, Nassau County

Docket Number: 3108-06/

Judge: William R. LaMarca

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SHORT FORM ORDER

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

**PRESENT: HON. WILLIAM R. LaMARCA
Justice**

JESSICA E. SEDANO,

Plaintiff,

-against-

JUSTIN K. ALLEN and RUSSELL M. ALLEN,

Defendants.

**Motion Sequence #001
Submitted March 14, 2008**

INDEX NO: 3108/06

The following papers were read on this motion:

Notice of Motion.....1
Affirmation in Opposition.....2
Reply Affirmation.....3

Counsel for defendants, JUSTIN K. ALLEN and RUSSELL M. ALLEN, moves for an order, pursuant to CPLR §3212, granting them summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury as defined by Insurance Law § 5102(d). Counsel for plaintiff, JESSICA E. SEDANO, opposes the motion, which is determined as follows:

This is an action to recover damages for personal injuries allegedly sustained by plaintiff in a two-car motor vehicle accident on May 16, 2003, at approximately 5:20 P.M. The accident occurred at or near the intersection of Clinton Street and Conklin Street in Farmingdale, New York. At her deposition, plaintiff testified that she had left work at the

Fleet Bank on Broadhollow Road in Melville, New York, where she worked full time as a teller, and was on her way to pick up her child at daycare in Bethpage, New York. She stated that she slowed down for a yellow light and then stopped for a red light at the subject intersection and was hit in the rear by a vehicle operated by defendant, JUSTIN K. ALLEN, and owned by defendant, RUSSELL M. ALLEN. On February 22, 2006, plaintiff commenced the action with the filing of a summons and complaint and alleged that she sustained serious and permanent personal injuries which were caused by the negligence and carelessness of defendants.

In her bill of particulars, plaintiff alleged that she sustained, *inter alia*, the following injuries: lumbar radiculitis; traumatic low back pain syndrome; straightening of the normal lordotic curvature of the lumbosacral spine; acute lumbar sprain; permanent limitation of motion of the lumbar spine; cervical radiculitis; acute cervical sprain; limitation of motion of the cervical spine; muscle spasm and tenderness in the cervical region; hyper flexion/extension injury to the cervical spine; traumatic neck pain syndrome; myofascial pain syndrome; permanent loss of the cervical spine; severe and chronic headaches, dizziness and insomnia.

Defendants now move for summary judgment dismissing the complaint on the grounds that plaintiff did not sustain a serious injury as defined by Insurance Law § 5102(d). In order to satisfy the statutory serious injury threshold, a plaintiff must have sustained an injury that is identifiable by objective proof; subjective complaints of pain do not qualify as a serious injury within the meaning of Insurance Law § 5102(d) (*see, Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 746 NYS2d 865, 774 NE2d 1197 [C.A. 2002]; *Scheer v Koubek*, 70 NY2d 678, 518 NYS2d 788, 512 NE2d 309 [C.A.1987];

Munoz v Hollingsworth, 18 AD3d 278, 795 NYS2d 20 [1st Dept. 2005]).

On a motion for summary judgment where the issue is whether a plaintiff has sustained a serious injury under the no-fault law, the movant bears the initial burden of presenting competent evidence that there is no cause of action (*Hughes v Cai*, 31 AD3d 385, 818 NYS2d 538 [2nd Dept. 2006]; cf., *Browdame v Candura*, 25 AD3d 747, 807 NYS2d 658 [2nd Dept. 2006]). If the movant satisfies that burden, the burden shifts to plaintiff to demonstrate, by the submission of objective proof of the nature and degree of the injury, that he/she sustained a serious injury or that there are questions of fact as to whether the purported injury, in fact, is serious (*Flores v Leslie*, 27 AD3d 220, 810 NYS2d 464 [1st Dept. 2006]).

In support of the motion, defendants submit the affirmed medical reports of Harold Kozinn, M.D., an orthopedist, and C.M. Sharma, M.D., a neurologist.

On May 17, 2007, Dr. Kozinn performed an independent orthopedic evaluation of plaintiff with range of motion testing and found, as follows: that plaintiff sustained a cervical sprain and lumbosacral sprain, both of which have resolved; that there is no disability; that there are no restrictions for usual work and activities; and that no treatment is indicated. Dr. Kozinn further stated the following regarding plaintiff's cervical spine:

	<u>Observed</u>	<u>Normal</u>
Forward flexion	30 degrees	30 degrees
Extension	30 degrees	30 degrees
Lateral bending right	45 degrees	45 degrees
Lateral bending left	45 degrees	45 degrees
Rotation right	50 degrees	50 degrees
Rotation left	50 degrees	50 degrees

No localized tenderness. Biceps, triceps were 5/5 bilaterally. Biceps, triceps, brachioradialis reflexes present and equal bilaterally. No sensory deficit noted.

On May 17, 2007, Dr. Sharma performed an independent neurological examination of plaintiff. Dr. Sharma concluded, in pertinent part, that: "[o]n examination there are no causally related neurological problems. There is no further need for neurological testing or treatment. There is no neurological disability."

The Court concludes that defendants have satisfied their burden of establishing a *prima facie* case, that plaintiff did not sustain a serious injury as defined by Insurance Law § 5102(d,) by submitting affirmations of medical experts who examined plaintiff and concluded that no objective medical findings support plaintiff's claim. *Toure v Avis Rent A Car Systems, Inc.*, *supra*: *cf.*, *DeLeon v Ross*, 44 AD3d 545, 844 NYS2d 36 [1st Dept. 2007]; *Shinn v Catanzaro*, 1 AD3d 195, 767 NYS2d 88 [1st Dept. 2003]). Consequently, the burden shifts to plaintiff to establish a triable issue of fact sufficient to defeat the motion.

In opposition to the motion, plaintiff states that, because of increasing neck and head pain, she went for treatment on the Monday following the accident to Dr. Kamins, a chiropractor, who started her on a course of physical therapy and chiropractic treatment three (3) times per week for three (3) to four (4) months. She states that Dr. Kamins referred her for MRI examinations on her neck and back, x-rays and EMG testing on her upper and lower extremities. She claims that Dr. Kamins indicated that she had a condition known as radiculopathy in the areas of the neck and back. Plaintiff states that she tried to contact Dr. Kamins but he no longer has an office on Long Island and neighbors have

told her that he discontinued his practice about one year ago.

Plaintiff claims that the chiropractic treatments together with Tylenol gave her some temporary relief, however, at the end of her no-fault benefits, she had no health insurance nor sufficient income to pay for further medical treatment, and she continued on her own with home stretching and strengthening exercises as well as with a neck and back brace which she continues to use several times per week. It is plaintiff's position that her injuries have caused her to restrict her activities and she can no longer stand for any length of time or lift anything weighing more than five (5) or six (6) pounds. She claims that she cannot carry or play ball with her children, do the laundry or heavy cleaning or go to the gym to exercise. She states that, since the accident, she has not had a full night's sleep as constant neck and back pain wakes her several times each night. Plaintiff contends that, because she was unable to stand on her feet, she was eventually laid off by Fleet Bank and is now employed in daycare with young children, where assistants do the heavy lifting and cleaning.

In further support, plaintiff submits the affirmation of Huseyin E. Tuncel, M.D., a family practitioner, who examined the plaintiff once, on December 29, 2007, over four-and-a-half years after the accident. In his report, Dr. Tuncel states that he "saw and felt spasms in her cervical and lumbar areas during [t]he physical examination. The foraminal compression test was positive on the cervical spine. The Nachla's test and Ely's test were positive bilaterally on the lumbar spine."

Dr. Tuncel further reported that plaintiff had restricted range of motion in her cervical spine as follows:

Forward Flexion: 25 degrees with 50 degrees being normal
Extension: 20 degrees with 60 degrees being normal
Left Rotation: 32 degrees with 80 degrees being normal
Right Rotation: 20 degrees with 80 degrees being normal
Left Lateral Flexion: 20 degrees with 40 degrees being normal
Right Lateral Flexion: 33 degrees with 40 degrees being normal

Additionally, plaintiff had restricted range of motion in her lumbar spine as follows:

Forward Flexion: 43 degrees with 90 degrees being normal
Extension: 10 degrees with 30 degrees being normal
Left Rotation: 5 degrees with 30 degrees being normal

Dr. Tuncel concluded, based upon the history provided by plaintiff, upon his physical examination of plaintiff and the objective tests and clinical observations, that plaintiff sustained serious and significant personal injuries as a direct result of the May 16, 2003 accident, including cervical and lumbar radiculopathy, acute cervical and lumbar sprain, myofascitis, and paraspinal sciatica. He opines that these personal injuries resulted in a significant limitation of use and function of her body's musculoskeletal and central and peripheral nervous system due to severe nerve damage, which prevent her from performing her customary and normal daily activities.

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]; *Mosheev 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*).

After a careful reading of the submissions herein, the Court finds that the differences of opinion among the 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).


Based on the foregoing, it is hereby

ORDERED, that defendants' motion for summary judgment is denied.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: May 29, 2008


 WILLIAM R. LaMARCA, J.S.C.
ENTERED
 JUN 03 2008
 NASSAU COUNTY
 COUNTY CLERK'S OFFICE

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