

Zinati v New York City Tr. Auth.

2008 NY Slip Op 31688(U)

June 16, 2008

Supreme Court, New York County

Docket Number: 0108224/2006

Judge: Donna Marie Mills

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SUPREME COURT OF THE STATE OF NEW YORK— NEW YORK COUNTY

PRESENT : DONNA M. MILLS
Justice

PART 21

ZINATI, MAHTAB

INDEX No. 108224/06

Plaintiff,

MOTION DATE _____

-v-

MOTION SEQ. No. 002

NEW YORK CITY TRANSIT AUTHORITY, et al.,
Defendants.

MOTION CAL No. _____

The following papers, numbered 1 to _____ were read on this motion for Summary Judgment

PAPERS NUMBER
FILED
JUN 19 2008
COUNTY CLERK'S OFFICE
NEW YORK

Notice of Motion/Order to Show Cause-Affidavits- Exhibits.... 1

Answering Affidavits- Exhibits _____

Replying Affidavits _____

CROSS-MOTION: _____ YES NO

Upon the foregoing papers, it is ordered that this motion for summary judgment is decided as follows:

BACKGROUND

This is an action to recover monetary damages for personal injuries suffered by the plaintiff as the result of an automobile accident that occurred on May 31, 2005 while she was operating a passenger vehicle and collided with a New York City Transit Authority (hereinafter "Authority") bus in the vicinity of East 33rd Street and Second Avenue in New York County.

In plaintiff's complaint, she alleges that she sustained a serious injury as defined by Insurance Law § 5102(d). The Authority now moves for summary judgment on the ground that plaintiff has not met the serious injury threshold (see Insurance Law §'s 5102 and 5104).

Applicable Law & Discussion

CPLR § 3212(b) requires that for a court to grant summary judgment, the court must determine if the movant's papers justify holding, as a matter of law, "that the cause of action or defense has no merit." It is well settled that the remedy of summary judgment, although a drastic one, is appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact (Yamattam v Thomas, 205 AD2d 615 [2nd Dept 1994]). Summary judgment should be denied when, based upon the evidence presented, there is any significant doubt as to the existence of a triable issue of fact (Rotuba Extruders v Ceppos, 46 NY2d 223 [1978]). When there is no genuine issue to be resolved at trial, the case should be summarily decided (Andre v Pomeroy, 35 NY2d 361, 364 [1974]).

"[A] defendant can establish that [a] plaintiff's injuries are not serious within the meaning of Insurance Law § 5102(d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (Grossman v Wright, 268 Ad2d 79, 83-84 [2nd Dept

2000]). If this initial burden is met, “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” (id. at 83-84).

This court finds that the Authority has met its initial burden by making a prima facie showing that plaintiff did not sustain a serious injury under Insurance Law § 5102(d) (see Martin v Schwartz, 308 AD2d 318 [1st Dept 2002]). The Authority had plaintiff examined by Dr. Menachem Epstein on October 8, 2007. According to the report, the plaintiff stated that she had constant neck pain and discomfort as well as mid-back and left shoulder pain with tingling which occasionally radiates down her left arm to her fingers and neck pain while driving. Dr. Epstein conducted a physical of plaintiff and his report revealed that his findings were reported as normal in all planes for the cervical spine, both shoulders, and the elbows, wrists and hands. He also reported all tests he performed on the plaintiff and concluded that the exam revealed no residual orthopedic or neurological impairment. Additionally he concluded that her injuries were resolved and plaintiff had no disability or significant limitations.

The Authority also had plaintiff examined by Dr. Naunihal Sachdev Singh in a neurologic independent medical evaluation on October 11, 2007. Dr. Singh’s report revealed that after a neurologic exam which he performed, he found normal ranges of motion in all planes tested in the cervical, thoracic and lumbar spine and the shoulders bilaterally. His opinion was that the

plaintiff was not disabled from a neurological point of view and that she could perform all daily activities without limitations.

As defendant has met its burden, the burden shifts to the plaintiff to come forward with evidence to prove that she sustained a serious injury within the meaning of the Insurance Law. Gaddy v Eyler, 79 NY2d 955, 957 (1992). Viewing the evidence in the light most favorable to the plaintiff, there is a triable issue of fact as to whether plaintiff has permanent motion limitations.

The Court of Appeals has held that whether a limitation of use of function is significant or consequential “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.” Toure v Avis Rent A Car Sys., 98 NY2d 345, 353 (2002), quoting Dufel v Green, 84 NY2d 795, 798 (1995). “In order to prove the extent or degree of physical limitation, an expert may designate a numeric percentage of a plaintiff’s loss of range of motion or may make a qualitative assessment of plaintiff’s condition, provided that the latter evaluation has an objective basis and compare the plaintiff’s limitations to the normal use of the affected body system or function.” Shinn v Ctanzaro, 1 AD3d at 198. In addition, the Court of Appeals has held that a significant limitation must be something more than a “minor, mild or slight limitation of use.” Gaddy v Eyler, 79 NY2d at 957, quoting Licari v Elliott, 57 NY2d 230, 236 (1982).

In opposition to the motion for summary judgment, plaintiff relies on the affidavit report of Gino Raimundo who was plaintiff’s treating chiropractor. His report states that plaintiff suffered herniated discs to her cervical spine as a result of the accident. He also states that she suffered a permanent injury to her cervical spine as a result of the accident. His report also

indicates the objective tests performed on plaintiff and the quantitative loss of range of motion he found in plaintiff.

Plaintiff was also examined by Dr. Craig Antell whose report stated that in his opinion, plaintiff suffered permanent injuries as a result of the accident. He also stated the objective tests performed and compared her restriction of motion to the normal ranges of motion.

In reply the Authority contend that as plaintiff did not have any further treatment for injuries sustained in the accident after February 24, 2006, the nature of plaintiff's injuries are limited. Although a cessation of treatment is not dispositive, a plaintiff who terminates therapeutic measures following the accident, while claiming "serious injury," must offer some reasonable explanation for having done so. Pommels v Perez, 4 NY3d 566, 574 (2005).

This court finds that Dr. Raimundo adequately explained any gap in treatment in his affidavit, stating that he concluded at plaintiff's discharge she had reached maximum improvement and any further treatment would be palliative in nature (see Pommells, supra [where a plaintiff's doctor stated that any further medical treatment would be "only palliative in nature...plaintiff's cessation of treatment was explained sufficiently to raise an issue of fact and survive summary judgment"]).

This evidence is sufficient to create a triable issue of fact with regard to the plaintiff's allegation that she sustained a serious injury (see Vitale v Lev Express Cab Corp. et al., 273 AD2d 225 [2nd Dept 2000]). Therefore, as a question of fact exists as to the nature and seriousness of plaintiff's injuries and as plaintiff offers an explanation for her cessation of treatment by the affidavit of Dr. Raimundo, summary judgment must be denied.

Accordingly, it is

ORDERED that the Authority's motion for summary judgment is denied.

Dated: 6/16/08

Donna M. Mills
J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

DONNA M. MILLS, J.S.C.

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