Taaffe v South Beach Car Serv. Ltd.
2008 NY Slip Op 32734(U)
September 29, 2008
Supreme Court, Richmond County
Docket Number: 102393/06
Judge: Philip G. Minardo
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[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND
--x
LAURA K. TAAFFE,

Plaintiff,

-against-

SOUTH BEACH CAR SERVICE LTD.
and DWAYNE COLEMAN,

Defendants.
---x

DCM Part 6
Present:
Hon. Philip G. Minardo

Decision and Order

Index No. 102393/06
Motion Nos. 001
002

The following papers numbered 1 to 3 were submitted on this motion the 24th day of July, 2008:

	Pages Numbered
Notice of Motion for Summary Judgment by Defendants South Beach Car Service LTD and Dwayne Coleman, with Supporting Papers, Exhibits and Memorandum of Law (dated December 3, 2007)	1
Notice of Motion by Plaintiff, with Supporting Papers and Exhibits (dated June 23, 2008)	2
Reply Affirmation (dated July 17, 2008)	3

Upon the foregoing papers, defendants' motion for summary judgment (Sequence No. 001) dismissing the complaint for failure to sustain a "serious injury" pursuant to Insurance Law §5102(d), is granted.[1]

[1]Plaintiff's motion (Sequence No. 002) to vacate the Order entered upon default on March 28, 2008 was effectively resolved in a stipulation consenting to such relief and signed by each of the parties under date of June 18, 2008. Annexed as Exhibit "7" to plaintiff's Motion to Vacate is her Affirmation in Opposition to defendants' summary judgment motion.

This is a personal injury action arising out of a motor vehicle accident that occurred on September 24, 2004 at or near the intersection of Anderson Street and Chestnut Avenue in Staten Island, when a vehicle owned and operated respectively by defendants allegedly failed to stop at a stop sign. As a result of this accident, plaintiff claims to have sustained, inter alia, "serious injuries" within the meaning of Insurance Law §5102(d).[2] Specifically, plaintiff's alleged injuries are said to include a "[r]ight knee chondromalacia patella requiring surgery"; "[l]eft neural foraminal protrusion at L4-L5; [p]osterior disc bulge at T12-L1; [d]isc bulge at L3-L4; [d]isc bulge at L5-S1"; "[c]entral disc protrusion at C3-C4; [and d]isc ridge complex with stenosis at C5-C6" (Plaintiff's Bill of Particulars, Defendants' Exhibit "C", para 11). Plaintiff further alleges that as a result of the subject accident, she was required to undergo "a right knee arthroscopy and debridement" (id.).

In support of the motion for summary judgment, defendants submit a report affirmed by a neurologist, Dr. Wendy Cohen (Defendants' Exhibit "F"), who reviewed plaintiff's medical records and conducted a physical examination of the plaintiff on August 30, 2007. According to Dr. Cohen, the measurements she obtained during plaintiff's examination revealed full range of motion of her cervical and thoracolumbar spine. Her diagnosis described plaintiff's post-cervical and thoracolumbar strain/sprain as resolved, and concluded that her neurological examination was "normal" (id.). Also annexed to the moving papers is a report affirmed by an orthopedist, Dr. Jacqueline Emmanuel (Defendants' Exhibit "E"), who also reviewed plaintiff's medical records and conducted a physical examination of plaintiff on August 30, 2007. Dr. Emmanuel's report quantified, inter alia, the range of motion of plaintiff's cervical spine, thoracic spine, lumbar spine,

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[2]Plaintiff claims serious injuries under three of the statutory categories, to wit: "a permanent consequential limitation of use of a body organ or member"; and/or "a significant limitation of use of a body function or system"; and/or "a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury of impairment" (see Plaintiff's Bill of Particulars, Defendants' Exhibit "C", para 20).

right shoulder and right knee, and found each of them to be within the normal range (id). In her examination of plaintiff's right knee, Dr. Emmanuel administered various tests, including the McMurray test, Lachman test, posterior drawer sign, valgus or varus instability and the pivot shift test, each of which was found to be negative (id). On these bases, Dr. Emmanuel concluded that plaintiff's claims of (1) cervical, thoracic, and lumbar sprain/strain; (2) right shoulder sprain/contusion; and (3) right knee arthroscopy were "resolved" (id.).

Lastly, defendants submit the affirmed reports of a radiologist, Dr. Allen Rothpearl, who reviewed the "MRIs" of plaintiff's lumbar and cervical spines, each of which were taken approximately one month post-incident (Defendants' Exhibit "G"). With respect to the MRI of plaintiff's lumbar spine, Dr. Rothpearl found (1) "Multilevel disc degeneration with disc bulges at T12-L1 and L4-L5", (2) "[n]o evidence of disc herniation", and (3) that her disc degenerations were "characterized by [the] dessication of disc material" (id.). In this regard, Dr. Rothpearl stated that "[t]he presence of disc degeneration indicates a chronic process of longstanding duration... [that] is unrelated etiologically to the accident of 9/24/2004" (id.). As for his review of the MRI of plaintiff's cervical spine, Dr. Rothpearl reported: "Straightening of lordosis. Multilevel disc degeneration. Spondylosis at C5-C6. Minimal degenerative bulges at C3-C4 and C5-C6. No evidence of disc herniation [and n]o evidence of neural encroachment." (id.). In his opinion, these findings are "unrelated etiologically to the accident of 9/24/2004." According to Dr. Rothpearl, "disc bulges of this nature are often seen in association with disc degeneration of the type depicted on this examination" (id.). In reliance upon these affirmed findings, defendants move for summary judgment dismissing the complaint for failure to meet the statutory threshold of "serious injury" under Insurance Law §5102(d).

In the opinion of this Court, defendants have met their prima facie burden of showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law §5102(d) (*see Fiorillo v. Arriaza*, __AD3d__, 859 NYS2d 699 [2nd Dept 2008]; *cf. Gaccione v. Krebs,* __AD3d__, 2008

Slip Op 6188 [2nd Dept.]; *Spahn v. Wohlmacher*, __AD3d__, 2008 Slip Op 5918 [2nd Dept]) through, e.g., the affirmations of their respective experts, who examined plaintiff and/or her MRIs and determined that there was no disability, restriction, or limitation as a result of the subject accident *(see Gousgoulas v. Melendez*, 10 AD3d 674 [2nd Dept 2004]).

In opposition, plaintiff has failed to raise a triable issue of fact as to whether she sustained a permanent or significant consequential limitation of use of her cervical and lumbar spine based on the reports of her radiologist and/or chiropractor (*cf. Casey v. Mas Transp Inc*, 48 AD3d 610 [2nd Dept 2008]). Although plaintiff's radiologist, Dr. Pursner-Jbara, affirmed the results of the MRIs of plaintiff's cervical spine and lumbar spine, each of which were taken approximately one month post-incident (Plaintiff's Exhibit "B"), the reports in question merely reiterate the spinal injuries recounted in plaintiff's bill of particulars (Defendants' Exhibit "C", para 11). The mere existence of a herniated or bulging disc is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting therefrom and its duration (*see Browne v. M& P Distrib. Corp.,* __AD3d__, 2008 NY Slip Op 5641 [2nd Dept]; *Patterson v. NY Alarm Response Corp*., 45 AD3d 656 [2nd Dept 2007]). In addition, plaintiff has submitted the affidavit of her chiropractor, Dr. Robert Valinotti (Plaintiff's Exhibit "C"), who treated her on a weekly basis from October 2004 through April 2005, but discontinued treatment when plaintiff "had reached her optimal level of improvement and further treatment would not have benefitted her" (id.). While the testing performed by Dr. Valinotti yielded quantified findings of the limitations in plaintiff's range of motion as compared to "normal" (*cf. Fiorillo v. Arriaza*, __AD3d__, 859 NYS2d at 700-701; *Malave v. Basikov*, 45 AD3d 539 [2nd Dept 2007]), his conclusions are nevertheless rendered speculative by his failure to address the findings of defendants' radiologist that the disc bulges in plaintiff's cervical and lumbar spine were the result of pre-existing degenerative processes rather than the subject accident (*see Phillips v. Zilinsky*, 39 AD3d 728, 729 [2nd Dept 2007]; *Bycinthe v. Kombos*, 29 AD3d 845, 845-856 [2nd Dept 2006]).

With respect to plaintiff's further claim that she sustained injuries to her right knee, the lack of any objective evidence of same constitutes a further failure to raise a triable issue of fact. In this regard, it is of little significance that the affirmation of plaintiff's physiatrist, Dr. Christopher Perez, states that at a recent examination conducted in March 2008 (nearly four years post-accident), the range of motion of plaintiff's right knee "reveals that Flexion is limited to 125 degrees with 135 degrees being normal"(Plaintiff's Exhibit "D"). Far more significant for present purposes is the affirmed MRI of plaintiff's right knee taken approximately one month after the incident (Plaintiff's Exhibit E") by her own radiologist, who reported "intrasubstance myxoid degeneration posterior horn and body medial meniscus without surfacing tear" (see Affirmation of Dr. Pursner-Jbara, Plaintiff's Exhibit "E"). It is well settled that "degenerative changes" which cannot be related to the accident in question are insufficient to raise a triable issue of fact (*see Brown v. Tairi Hacking Corp*, 23 AD3d 325 [2nd Dept 2005]). In addition, the affirmations of plaintiff's radiologist report that the nearly-contemporaneous MRI of plaintiff's right knee revealed "chronic anterior cruciate ligament sprain injury with interstitial and periligamentous edema and mild expansion of fibers without laxity or discontinuity [as well as m]edial patellar retinacular sprain injury with periligamentous edema extending to ventral fibers of medial collateral ligament without discontinuity". Sprains and strains are not serious injuries within the meaning of Insurance Law §5102(d) (*see Rabolt v. Park*, 50 AD3d 995 [2nd Dept 2008]); neither do injuries that may be termed minor, mild or slight (*see Kravtsov v. Wong*, 11 AD3d 516 [2nd Dept 2004]; *Coughlan v. Donnelly*, 172 AD2d 480 [2nd Dept 1991]). Finally, notwithstanding the right knee arthroscopy that was performed by plaintiff's orthopedist in January of 2006, the affirmation of Dr. Paul DiCesare is flawed by the failure to establish a causal connection between the alleged injury to plaintiff's right knee and the subject accident (*see Budhram v. Ogunmoyin*, __AD3d__, 2008 NY Slip Op 6437 [2nd Dept])

As for plaintiff's claims under the 90/180 category of serious injury, plaintiff has not only

failed to proffer any competent medical evidence demonstrating that she sustained a medically-determined injury of a nonpermanent nature which prevented her from performing her usual and customary activities for 90 of the first 180 days following the subject accident, but testified at her examination before trial that she missed “not more than two [months]” of work as a result of the subject accident (Defendant’s Exhibit “D”) (*see Rabolt v. Park,* 50 AD3d at 996).

Accordingly, it is

ORDERED that defendants’ motion for summary judgment is granted; and it is further

ORDERED that the complaint is dismissed; and it is further

ORDERED that the Clerk enter judgment and mark his records accordingly.

ENTER,

s/ Philip G. Minardo

J.S.C.

DATED: September 29, 2008