

Vitarelli v Ryder Truck Rental Inc.

2008 NY Slip Op 33026(U)

November 3, 2008

Supreme Court, Suffolk County

Docket Number: 08-1793

Judge: Peter H. Mayer

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INDEX NO. 08-1793
CAL. NO. 08-00644-MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 3-27-08
ADJ. DATE 7-1-08
Mot. Seq. # 001 - MG; CASEDISP

-----X	
KRISTY M. VITARELLI,	:
	:
Plaintiff,	:
	:
- against -	:
	:
RYDER TRUCK RENTAL INC., PEERLESS	:
IMPORTERS, INC. and ANTHONY S. LIPARI,	:
	:
Defendants.	:
-----X	

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendants Ryder Truck Rental Inc. and Anthony Lipari, dated March 5, 2008, and supporting papers (including Memorandum of Law dated _____); (2) Notice of Cross Motion by the , dated , and supporting papers; (3) Affirmation in Opposition by the plaintiff, dated June 23, 2008, and supporting papers; (4) Reply Affirmation by the defendants Ryder Truck Rental Inc. and Anthony Lipari, dated June 30, 2008, and supporting papers; (5) Other (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that this motion by defendants seeking summary judgment dismissing plaintiff's complaint is granted.

This is an action to recover damages for injuries allegedly sustained by plaintiff Kristy Vitarelli as a result of a motor vehicle accident that occurred on December 12, 2005 on the Long Island Expressway. The accident allegedly occurred when a vehicle driven by defendant Anthony Lipari and owned by defendant Ryder Truck Rental struck the driver's side of the vehicle operated by plaintiff. Plaintiff alleges, by her bill of particulars, that she sustained various personal injuries, including disc herniations at levels C6-C7 and disc bulges at levels C5-C6.

Defendants now move for summary judgment on the basis that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d). In support of the motion, defendants submit the pleadings, plaintiff's deposition transcript, and the medical report of Dr. Maria DeJesus, neurologist, who conducted an examination of plaintiff on August 7, 2006. Defendants also submit the medical report prepared by Dr. Itzhak Haimovic, neurologist, who conducted an independent examination of plaintiff on August 7, 2007. In addition, defendants submit the medical report of Dr. Scott Coyne, radiologist, who reviewed the magnetic resonance imaging ("MRI") scan of plaintiff's cervical and lumbar regions performed in March 2006, the medical reports regarding such examination and other related documents.

Plaintiff opposes the instant motion on the ground that defendants have failed to sustain their burden to establish that he did not sustain a serious injury within the meaning of Insurance Law § 5102(d). In opposition to the motion, plaintiff submits copies of plaintiff's medical records from Flushing Hospital Medical Center's emergency room, the affidavit and treatment notes of Dr. Thomas Tini, a chiropractor, and the medical report of Dr. Robert Diamond, a radiologist.

The purpose of New York State's No-Fault Insurance Law is to "assure prompt and full compensation for economic loss by curtailing costly and time-consuming court trial[s]" (*see Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]), and requiring every case, even those with minor injuries, to be decided by a jury would defeat the statute's effectiveness (*see Licari v Elliott, supra*). Therefore, the No-Fault Insurance law precludes the right of recovery for any "non-economic loss, except in the case of serious injury, or for basic economic loss" (*see Insurance Law § 5104 [a]; Martin v Schwartz*, 308 AD2d 318, 766 NYS2d 13 [2003]). Any injury not falling within the definition of "serious injury" is classified as an insignificant injury, and a trial is not allowed under the No-Fault statute (*see Pommells v Perez*, 4 NY3d 566, 797 NYS2d 380 [2005]; *Gaddy v Eycler*, 79 NY2d 955, 582 NYS2d 990 [1992]; *Martin v Schwartz, supra*).

Insurance Law § 5102 (d) defines a "serious injury" as "a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; 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 ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment."

A defendant may also establish entitlement to summary judgment, using the plaintiff's deposition testimony and medical reports and records prepared by the plaintiff's own physicians (*see Fragale v Geiger*, 288 AD2d 431, 733 NYS2d 901 [2001]; *Grossman v Wright*, 268 AD2d 79, 707 NYS2d 233 [2000]; *Vignola v Varrichio*, 243 AD2d 464, 662 NYS2d 831 [1997]; *Torres v Micheletti*, 208 AD2d 519, 616 NYS2d 1006 [1994]). Once defendant has met this burden, plaintiff must then submit objective and admissible proof of the nature and degree of the alleged injury in order to meet the threshold of the statutory standard for "serious injury" under New York's No-Fault Insurance Law (*see Tornabene v Pawlewski*, 305 AD2d 1025, 758 NYS2d 593 [2003]; *Dufel v Green*, 84 NY2d 795, 622 NYS2d 900 [1995]; *Pagano v Kingsbury, supra*). However, if a defendant does not establish a prima facie case that the plaintiff's injuries do not meet the serious injury threshold, the court need not consider the sufficiency of the plaintiff's

opposition papers (see *Burns v Stranger*, 31 AD3d 360, 819 NYS2d 60 [2006]; *Rich-Wing v Baboolal*, 18 AD3d 726, 795 NYS2d 706 [2005]; see generally, *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]).

Further, to recover under the “permanent loss of use” category, a plaintiff must demonstrate a total loss of use of a body organ, member, function or system (*Oberly v Bangs Ambulance*, 96 NY2d 295, 299, 727 NYS2d 378 [2001]). A plaintiff claiming injury within the “limitation of use” categories must substantiate his or her complaints of pain with objective medical evidence showing the extent or degree of the limitation of movement caused by the injury and its duration (see *Laruffa v Yui Ming Lau*, 32 AD3d 996, 821 NYS2d 642 [2006]; *Cerisier v Thibiu*, 29 AD3d 507, 815 NYS2d 140 [2006]; *Meyers v Bobower Yeshiva Bnei Zion*, 20 AD3d 456, 797 NYS2d 773 [2005]). He or she must present medical proof contemporaneous with the accident showing the initial restrictions in movement or an explanation for its omission (see *Bell v Rameau*, 29 AD3d 839, 814 NYS2d 534 [2006]; *Suk Ching Yeung v Rojas*, 18 AD3d 863, 796 NYS2d 661 [2005]; *Ifrach v Neiman*, 306 AD2d 380, 760 NYS2d 866 [2003]), as well as objective medical findings of restricted movement that are based on a recent examination (see *Laruffa v Yui Ming Lau*, *supra*; *Murray v Hartford*, 23 AD3d 629, 804 NYS2d 416 [2005], *lv denied* 6 NY3d 713, 816 NYS2d 748 [2006]; *Batista v Olivo*, 17 AD3d 494, 795 NYS2d 54 [2005]; *Kauderer v Penta*, 261 AD2d 365, 689 NYS2d 190 [1999]). “Whether a limitation of use or function is ‘significant’ or ‘consequential’ * * * relates to medical significance and 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” (*Dufel v Green*, *supra*; see *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 746 NYS2d 865 [2002]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (see *Licari v Elliott*, *supra*). Furthermore, when a defendant in an action to recover damages for serious injury presents evidence demonstrating that a plaintiff’s alleged pain and injuries are related to a pre-existing condition, the plaintiff must come forward with evidence addressing the defense of lack of causation (*Pommells v Perez*, 4 NY3d 566, 797 NYS2d 380 [2005]; *Franchini v Palmieri*, 1 NY3d 536, 775 NYS2d 232 [2003]; *Luciano v Luchsinger*, 46 AD3d 634, 847 NYS2d 622 [2007]; *Giraldo v Mandanici*, 24 AD3d 419, 805 NYS2d 124 [2005]).

Here, defendants have made out a prima facie entitlement to judgment as a matter of law by establishing that plaintiff’s injuries are not causally related to the accident and, therefore, do not satisfy the serious injury threshold of Insurance Law § 5102 (d) (see *Franchini v Palmieri*, 1 NY3d 536, 775 NYS2d 232 [2003]; *Toure v Avis Rent A Car Sys.*, *supra*; *Mullings v Huntwork*, 26 AD3d 214, 810 NYS2d 443 [2006]). The medical report of Dr. Coyne establishes prima facie that plaintiff had a pre-existing degenerative condition in her lumbar spine that is longstanding and not causally related to the subject accident (see *Cariddi v Hassan*, 45 AD3d 516, 845 NYS2d 426 [2007]; *Lea v Cucuzza*, 43 AD3d 882, 842 NYS2d 468 [2007]). Further, the report of Dr. DeJesus states that plaintiff has full ranges of motion in her cervical and lumbar spines, with no evidence of spasm on palpation. It states that plaintiff walks with a normal gait, that the muscle tone and strength in her examination is normal, and that her sensation is intact. Dr. DeJesus concludes that despite there being a causal relationship between plaintiff’s alleged injuries and the subject accident, plaintiff’s cervical and lumbar sprains are resolved and there is no need for further medical treatment.

Furthermore, plaintiff’s deposition testimony supports defendant’s prima facie argument that she did not sustain a serious injury (see *Choi Ping Wong v Innocent*, 54 AD3d 384, ___ NYS2d ___ [2008];

Casas v Montero, 48 AD3d 728, 853 NYS2d 358 [2008]; *Shvartsman v Vildman*, 47 Ad3d 700, 849 NYS2d 600 [2008]). Plaintiff testified that she was traveling in heavy, stop-and-go traffic at the time of the subject accident. Plaintiff testified that after refusing medical service at the scene, she was driven to her friend's house by the tow truck driver. Plaintiff testified that her friend then drove her to Flushing Hospital Medical Center's emergency room, because she was experiencing a numbing pain in her left arm and neck. Plaintiff testified that she was treated in the emergency room, released with a prescription for pain medication and told to follow-up with her doctor. She testified that she sought treatment from Dr. Tini, a chiropractor, the Monday after the accident. Plaintiff testified that she complained to Dr. Tini that she was experiencing pain in her neck and back. She testified that at that first appointment, Dr. Tini "adjusted" her neck and back. Plaintiff testified that Dr. Tini informed her that she had scoliosis of the spine. She testified that she received chiropractic treatments to her neck and back three times a week for the first month, then twice a week thereafter. Plaintiff testified that she received chiropractic treatments for approximately six months, but that she would take "breaks" from the treatments, because they were "too painful." Plaintiff testified that after six months her No-Fault benefits were terminated, and that Dr. Tini did not accept her insurance. Plaintiff testified that she had health insurance, but did not search for a chiropractor that would accept her health insurance. Plaintiff, who is employed as a receptionist in a dermatologist's office, and testified she missed only one day of work immediately after the accident, but that over the course of a year and a half she has missed approximately 10 days due to pain caused by her alleged injuries. Plaintiff further testified that she never received physical therapy, acupuncture or steroid injections, although two different neurologists recommended such treatments to her.

As a result of the aforementioned, defendants have shifted the burden to plaintiff to come forward with evidence showing that she did in fact sustain a serious injury (see *Gaddy v Eyler*, *supra*; *Grasso v Angerami*, 79 NY2d 813, 580 NYS2d 178 [1991]; *Pagano v Kingsbury*, *supra*; see generally *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). Contrary to plaintiff's assertions, the evidence submitted in opposition has failed to raise a triable issue of fact as to the existence of a serious injury (see *Colvin v Maille*, 127 AD2d 926, 511 NYS2d 982 [1987]; *lv denied* 69 NY2d 611; 517 NYS2d 1026 [1987]). Here, plaintiff failed to provide a reasonable explanation for her cessation of medical treatment for her alleged cervical and lumbar spine injuries six months after the subject motor vehicle accident (see *Phillips v Zilinsky*, 39 AD3d 728, 834 NYS2d 299 [2007]; *Hasner v Budnik*, *supra*; *D'Alba v Yong-Ae Choi*, 33 AD3d 650, 823 NYS2d 423 [2006]; *Bycinthe v Kombos*, 29 AD3d 845, 815 NYS2d 693 [2006]). Although plaintiff asserts that she continued to treat with Dr. Tini sporadically after her No-Fault benefits were terminated, she did not explain her failure to seek alternate treatment from a physician that accepted her medical insurance. In addition, she failed to present any evidence substantiating the claim that her No-Fault benefits were terminated after six months, and that, despite being employed full time, she could not afford to pay for additional medical care (see *Mohamed v Siffrain*, 19 AD3d 561, 797 NYS2d 532 [2005]; *Neugebauer v Gill*, 19 AD3d 567, 797 NYS2d 541 [2005]; *Villalta v Schechter*, 273 AD2d 299, 710 NYS2d 87 [2000]).

Moreover, the report of Dr. Tini contradicts the deposition testimony of plaintiff. Plaintiff specifically testified that she did not experience pain in her lower back and Dr. Tini, in part, bases his conclusion that plaintiff has sustained a permanent, partial disability, on plaintiff experiencing lower back pain that radiated down her left leg. In addition, plaintiff testified that Dr. Tini informed her that she had scoliosis of the spine, which Dr. Tini's affidavit failed to address. More importantly, the affidavit failed

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to address defendants' expert's conclusion that plaintiff suffered from a pre-existing degenerative condition of the lumbar spine (*see Franchini v Palmieri*, 1 NYS3d 536, 775 NYS2d 232 [2003]; *Scott v Aponte*, 49 AD3d 1131, 854 NYS2d 243 [2008]; *Cadena v Espinal*, 49 AD3d 582, 852 NYS2d 795 [2008]; *Luciano v Luchsinger*, 46 AD3d 634, 847 NYS2d 622 [2007]; *Kaplan v Vanderhans*, 26 AD3d 468, 809 NYS2d 582 [2006]). Thus, Dr. Tini's conclusion that plaintiff suffers from a loss in her normal range of motion, which "becomes evident in orthopedic and neurological testing" is conclusory and speculative (*see Marrache v Akron Taxi Corp.*, 50 AD3d 973, 856 NYS2d 239 [2008]; *Giraldo v Mandanici*, 24 AD3d 419, 805 NYS2d 124 [2005]; *Ginty v MacNamara*, 300 AD2d 624, 751 NYS2d 790 [2002]). Likewise, the affidavit of Dr. Diamond, who reviewed the MRI of plaintiff's cervical spine, and states that plaintiff has a disc bulge at level C/5-C6 and a disc herniation at level C6-C7, fails to state whether the disc herniations or disc bulges were causally related to the subject accident (*see Choi Ping Wong v Innocent*, 54 AD3d 384, ___ NYS2d ___ [2008]). "The mere existence of a herniated disc, ..., is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from the injury and its duration" (*Choi Ping Wong v Innocent*, 54 AD3d 384, 385, ___ NYS2d ___ [2008]; *see also, Cornelious v Cintas Corp.*, 50 AD3d 1085, 857 NYS2d 637 [2008]; *Shvartsman v Vildman*, 47 AD3d 700, 849 NYS2d 600 [2008]; *Mejia v DeRosa*, 35 AD3d 407, 825 NYS2d 722 [2006]). Similarly, the copies of the unsworn and unsigned chiropractic treatment reports submitted by plaintiff do not constitute evidentiary proof in admissible form sufficient to defeat summary judgment (*see CPLR 2106; Burgos v Vargas*, 33 AD3d 579, 822 NYS2d 297 [2006]; *Peschanker v Loporto*, 252 AD2d 485, 675 NYS2d 363 [1998]; *Moore v Tapan*, 242 AD2d 526, 661 NYS2d 665 [1997]; *see also, CPLR 2106*).

Further, the Court notes that the record fails to establish that plaintiff was substantially curtailed from all of her usual and customary activities for 90 of the first 180 days following the accident (*see Rennell v Horan*, 225 AD2d 939, 639 NYS2d 171 [1996] *Balshan v Bouck*, 206 AD2d 747, 614 NYS2d 487 [1994]; *Kimball v Baker*, 174 AD2d 925, 571 NYS2d [1991]). In addition, the record also fails to demonstrate that there was a medically determined injury that prevented plaintiff from engaging in her usual daily activities immediately following the accident (*see Gaddy v Eyler, supra; Hausman v Gourville*, 248 AD2d 674, 670 NYS2d 320 [1998]; *Sainte-Aime v Ho*, 274 AD2d 569, 712 NYS2d 133 [2000]; *Balshan v Bouck, supra*). Plaintiff testified that immediately following the accident she missed one day from work, but over the course of a year and half, she missed approximately 10 days from work. Although plaintiff testified that she is unable to run around with her children in the park and exercise, she also testified that she is still able to maintain the coaching of her daughter's soccer team and has driven more than 15,000 miles in the past year. Under the circumstances, plaintiff's testimony that she was unable to play with her children, exercise, or write for too long are unavailing and fails to establish that she was unable to perform her daily activities for no less than 90 days out of the first 180 days immediately following the accident (*see Rodriguez v Abdallah*, 51 AD3d 590, 858 NYS2d 169 [2008]; *Cruz v Calabiza*, 226 AD2d 242, 641 NYS2d 255 [1996]; *cf. Loesburg v Jovanovic*, 264 AD2d 301, 694 NYS2d 362 [1999]). Accordingly, defendants' motion of summary judgment is granted.

Dated: 11/3/08


PETER H. MAYER, J.S.C.