

Sinfelt v Helm's Bros. Inc

2008 NY Slip Op 33587(U)

April 17, 2008

Supreme Court, Queens County

Docket Number: 15040/2005

Judge: Peter Joseph Kelly

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SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PETER J. KELLY
Justice

IAS PART 16

PETRA SINFELT,
Plaintiff,

- against -

HELM'S BROS. INC, et al.,

Defendants.

INDEX NO. 15040/2005

MOTION
DATE April 1, 2008

MOTION
CAL. NO. 14

MOT. SEQ.
NUMBER 1

The following papers numbered 1 to 7 read on this motion by the defendants Kwang Kyu Kim and Dongsun Kim for summary judgment dismissing the plaintiff's complaint for failure to establish the existence of a "serious injury" pursuant to Insurance Law §5102[d].

	<u>PAPERS</u> <u>NUMBERED</u>
Notice of Motion/Affid(s)-Exhibits.....	1 - 4
Affid(s) in Opp.-Exhibits.....	5 - 6
Replying Affirmation.....	7

Upon the foregoing papers the motion is determined as follows:

The defendants' moving papers establish that the plaintiff was involved in an automobile accident on January 13, 2003 and commenced this action to recover for her alleged injuries. The defendants contend that the plaintiff's injuries do not meet the serious injury threshold set forth by New York Insurance Law §5102[d] and her complaint should therefore be dismissed.

In support of their argument, the defendants have offered the affirmations of Frank M. Hudak, M.D., an orthopedic surgeon, Wendy Cohen, M.D., a neurologist, and Sondra Pfeffer, M.D., a radiologist. Dr. Hudak's affirmation sets forth that he conducted an orthopaedic examination of the plaintiff on January 5, 2007. Dr. Hudak found, inter alia, the plaintiff to have full range of motion in her cervical and lumbar spines, shoulders, elbows and wrists by stating the ranges of motion he observed and comparing it to the normal range of motion for the allegedly affected body part. Dr. Hudak opined that the plaintiff sustained resolved sprains and that there were no permanent effects from the accident.

Dr. Cohen conducted a neurological evaluation of the plaintiff on December 27, 2006. Dr. Cohen also found the plaintiff to have full range of motion in her cervical and lumbar spines by stating the

observed range of motion and comparing it to the normal range of motion for the allegedly affected body part. Dr. Cohen opined that the plaintiff was not neurologically disabled and recovered from any injuries she sustained.

Dr. Pfeffer examined an MRI films of the plaintiff's cervical and lumbar spines taken on February 25, 2003 and March 13, 2003, respectively. As to the cervical and lumbar spines, Dr. Pfeffer averred that the abnormalities displayed in the studies were degenerative in origin, predated the accident and not causally related thereto.

These affirmations establish prima facie that the plaintiff did not sustain a serious injury as the result of the motor vehicle accident that is the subject of this action (See, Licari v Elliott, 57 NY2d 230, Guzman v Paul Michael Management, 266 AD2d 508; see also, Meekly v 4 G's Truck Renting Co., Inc., 16 AD3d 26; Kearse v NYCTA, 16 AD3d 45; Willis v N.Y. City Transit Auth., 14 AD3d 696; Sieradzki v US Express Leasing, 13 AD3d 608; Fauk v Jenkins, 301 AD2d 564). Thus, the burden shifted to the plaintiff to come forward with sufficient evidence that he sustained serious injuries (See, Gaddy v Eyler, 79 NY2d 955).

In opposition to the motion, the plaintiff submitted, in addition to her affidavit, the affidavit of Mark S. Snyder, D.C., her treating chiropractor. Also submitted was the affirmation of Richard J. Rizzuti, M.D., a radiologist.

The affidavit from the chiropractor and the affirmation of Dr. Rizzuti failed to raise an issue of fact. Although the chiropractor averred that the plaintiff displayed a loss of range of motion in her cervical and lumbar spines, he, as well as Dr. Rizzuti, failed to comment on and contradict the conclusion of the defendants' radiologist that the conditions in the plaintiff's cervical spine were pre-existing and degenerative. Therefore, the assertions by the chiropractor that the plaintiff's injuries to her cervical spine were causally related to the accident were mere speculation (See, Cadena v Espinal, _____ AD3d _____, 2008 NY Slip Op 2094; Roman v Fast Lane Car Serv., Inc., 46 AD3d 535; Lorthe v Adeye, 306 AD2d 252; Ginty v McNamara, 300 AD2d 624; Narducci v McRae 298 AD2d 443).

Consequently, the plaintiff's proof fails to establish that she sustained a "permanent consequential limitation of use of a body organ or member" or a "significant limitation of use of a body function or system" (See, Toure v Avis Rent A Car Systems, Inc., 98 NY2d 345; Chinnici v Brown, 295 AD2d 465). Also, since the plaintiff has adduced no evidence that she has totally lost the use of her spine or right shoulder, she failed to establish a "permanent loss of use of a body organ, member, function or system" (Oberly v Bangs Ambulance, Inc., 96 NY2d 295).

The plaintiff's affidavit and deposition testimony failed to establish that she was "curtailed from performing [her] usual activities to a great extent rather than some slight curtailment" (Licari v

Elliott, supra at 236). Specifically, the work, household and recreational activities along with the generally described restrictions of motion allegedly incurred by the plaintiff do not meet the "substantially all" threshold (See, Omar v Goodman, 295 AD2d 413, Delgado v Hakim, 287 AD2d 592, Scott v Leung, 287 AD2d 612, Szabo v XYZ, Two Way Radio Taxi Association, Inc., 267 AD2d 134).

Accordingly, after considering the evidence in a light most favorable to the plaintiffs (Kelly v Media Services Corp, 304 AD2d 717; Krohn v Felix Industries, 302 AD2d 499), the motion by the defendants for summary judgment is granted and the plaintiff's complaint is dismissed.

Dated: April 17, 2008

Peter J. Kelly, J.S.C.