

Verity v Gausman

2010 NY Slip Op 30621(U)

March 16, 2010

Supreme Court, Nassau County

Docket Number: 22429/07

Judge: Antonio I. Brandveen

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN
J. S. C.

DAWN VERITY and STANFORD VERITY,

Plaintiff,

- against -

GERARD GAUSMAN,

Defendant.

TRIAL / IAS PART 29
NASSAU COUNTY

Index No. 22429/07

Motion Sequence No. 001

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	<u>1</u>
Answering Affidavits	<u>2</u>
Replying Affidavits	_____
Briefs: Plaintiff's / Petitioner's	_____
Defendant's / Respondent's	_____

The defense moves pursuant to CPLR 3212 for summary judgment against the plaintiff Dawn Verity only on the ground the injuries allegedly sustained by the plaintiff in a May 29, 2006 automobile accident do not satisfy the Insurance Law § 5102 (d) threshold, so the plaintiff's claims should be dismissed. The plaintiff opposes this motion on the ground she sustained serious injury as defined by the Insurance Law §§ 5102 (d) and 5104 (a) resulting from the motor vehicle accident. This Court carefully reviewed and considered all of the papers submitted by the parties with respect to this motion.

Under CPLR 3212(b), a motion for summary judgment "shall show that there is no

defense to the cause of action or that the cause of action or defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.” “The motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact.” Summary judgment is a drastic remedy that is awarded only when it is clear that no triable issue of fact exists (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 325; *Andre v. Pomeroy*, 35 N.Y.2d 361). Summary judgment is the procedural equivalent of a trial (*Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 A.D. 2d 572). Thus the burden falls upon the moving party to demonstrate that, on the facts, it is entitled to judgment as a matter of law (*see, Whelen v. G.T.E. Sylvania Inc.*, 182 A.D. 2d 446). The court’s role is issue finding rather than issue determination (*see, e.g., Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395; *Gervasio v. Di Napoli*, 134 A.D.2d 235, 236; *Assing v. United Rubber Supply Co.*, 126 A.D.2d 590). Nevertheless, “the court must evaluate whether the alleged factual issues presented are genuine or unsubstantiated” (*Gervasio v. Di Napoli, supra*, 134 A.D.2d at 236, quoting from *Assing v. United Rubber Supply Co., supra; see, Columbus Trust Co. v. Campolo*, 110 A.D.2d 616, *aff’d* 66 N.Y.2d 701). If the issue claimed to exist is not genuine, and, therefore, there is nothing to be resolved at the trial, the case should be summarily decided (*see, Andre v. Pomeroy*, 35 N.Y.2d at 364; *Assing v. United Rubber Supply Co., supra*).

The Court of Appeals has observed:

The No-Fault Law provides a plan for compensating victims of automobile accidents for their economic losses without regard to fault or negligence. An injured party may bring a plenary action in tort, however, to recover for non-economic loss, pain and suffering, but must show that he or she has suffered a serious injury within the meaning of the No-Fault Law

Oberly v. Bangs Ambulance Inc., 96 N.Y.2d 295, 296-297, 727 N.Y.S.2d 378 [2001].

Insurance Law § 5102 (d) provides:

“Serious injury” means 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.

This State’s highest Court holds:

Hence, the word ”significant “ as used in the statute pertaining to ”limitation of use of a body function or system“ should be construed to mean something more than a minor limitation of use. We believe that a minor, mild or slight limitation of use should be classified as insignificant within the meaning of the statute

Licari v. Elliott, 57 N.Y.2d 230, 236, 455 N.Y.S.2d 570 (1982).

The *Licari* Court also stated: “It requires little discussion that plaintiff's subjective complaints of occasional, transitory headaches hardly fulfill the definition of serious injury...To hold that this type of ailment constitutes a serious injury would render the statute meaningless and frustrate the legislative intent in enacting no-fault legislation” (*supra*, p. 238-239).

The Second Department reiterated that body of law when it stated:

a defendant can establish that the 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 (*see, Turchuk v Town of Wallkill*, 255 AD2d 576). With this established, 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 (*see, Gaddy v Eyler*, 79 NY2d 955). The plaintiff in such a situation must present objective evidence of the injury. The mere parroting of language tailored to meet statutory requirements is insufficient (*see, Powell v Hurdle*, 214 AD2d 720; *Giannakis v Paschilidou*, 212 AD2d 502). Further, this Court has consistently held that a plaintiff's subjective claim of pain and limitation of motion must be sustained by verified objective medical findings (*see, Kauderer v Penta*, 261 AD2d 365; *Carroll v Jennings, supra*). Moreover, these verified objective medical findings must be based on a recent examination of the plaintiff (*see, Kauderer v Penta, supra*). In that vein, any significant lapse of time between the cessation of the plaintiff's medical treatments after the accident and the physical examination conducted by his own expert must be adequately explained (*see, Smith v Askew*, 264 AD2d 834).

Therefore, in order to successfully oppose a motion for summary judgment on the issue of whether an injury is serious within the meaning of Insurance Law § 5102 (d), the plaintiff's expert must submit quantitative objective findings in addition to an opinion as to the significance of the injury. Although each case will stand or fall on its own facts, certain objective tests satisfy this standard

Grossman v. Wright, 268 A.D.2d 79, 83-84, 707 N.Y.S.2d 233 (2nd Dept., 2000).

The Second Department stated:

We hold, consistent with our prior rulings in *Perez v. State of New York, supra* and *Zecca v. Riccardelli, supra* that serious injury is quintessentially an issue of damages, not liability. In the event a plaintiff at a damages trial fails to sustain the burden of establishing serious injury, the plaintiff is not entitled to any recovery despite proof of common law liability

Van Nostrand v. Froehlich, 44 A.D.3d 54, 62, 844 N.Y.S.2d 293 [2nd Dept., 2007].

The Second Department also held:

It is well settled that evidence submitted in support of a motion for summary judgment must be in admissible form (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067; *Zuckerman v City of New York*, 49 NY2d 557, 563). In addition, “if the opponent is to succeed in defeating a summary judgment motion he [or she], too, must make [a] showing by producing evidentiary proof in admissible form”, unless he or she demonstrates an “acceptable excuse for [the] failure to meet the strict requirement of tender in admissible form” (*Zuckerman v City of New York*, *supra*, at 562).

Thus, when a defendant moves for summary judgment dismissing the complaint based on the plaintiff's failure to establish “serious injury” and relies solely on findings of the defendant's own medical witnesses, those findings must be in admissible form, i.e., affidavits or affirmations, and not unsworn reports, in order to make a “prima facie showing of entitlement to judgment as a matter of law” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853).

Pagano v. Kingsbury, 182 A.D.2d 268, 270, 587 N.Y.S.2d 692 (2nd Dept., 1992).

The Second Department also held:

In order to defeat the defendants' motion for summary judgment, the plaintiffs were thus required to produce evidentiary proof in admissible form demonstrating the existence of an issue of fact, or to provide an “acceptable excuse for [the] failure to meet the strict requirement of tender in admissible form” (*Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718; *Pagano v. Kingsbury*, *supra*)

Jacondino v. Lovis, 186 A.D.2d 109, 110, 587 N.Y.S.2d 696 [2nd Dept., 1992].

Moreover,

While a cessation of treatment is not dispositive-the law surely does not require a record of needless treatment in order to survive summary judgment-a plaintiff who terminates therapeutic measures following the accident, while claiming “serious injury,” must offer some reasonable explanation for having done so

Pommells v. Perez, 4 N.Y.3d 566, 574, 830 N.E.2d 278 [2005].

The defense orthopedist examined the plaintiff on November 13, 2008, and found the plaintiff's lumbar sprain with no clinical evidence of neuromotor deficits, no clinical

evidence of herniated discs, radiculitis or radiculopathy, resolved. The defense orthopedist diagnosed the plaintiff's cervical sprain with no clinical evidence of neuromotor deficits, no clinical evidence of herniated discs, radiculitis or radiculopathy, resolved. The defense neurologist examined the plaintiff on January 29, 2009, and opined cervical spine sprain/strain - resolved. The defense neurologist found a normal neurological examination of the thoracic spine, and diagnosed the plaintiff's lumbar spine sprain/strain - resolved.

The plaintiff's orthopedist conducted an examination of the plaintiff on June 1, 2006, and stated, in an unsigned, unsworn statement, the plaintiff had cervical strain and lumbar strain, and should begin physical therapy with increased Motrin. That examination was followed by others, as stated in unsigned, unsworn statements by physicians at the same facility, on June 13, 2006, July 11, 2006, August 31, 2006, November 21, 2006. These examinations were followed by a January 2, 2007 unsworn statement by another physician at the same facility, who dictated the report, but did not read it, and a January 22, 2007 unsigned, unsworn statement by that same latter physician. The plaintiff's neurologist, who examined the plaintiff on November 19, 2009, states, in a January 5, 2010 affirmation, he disagrees with the diagnosis by the defense medical experts, and states the plaintiff is left as a result of the subject accident with on going and objective permanent injuries which could reasonably limit her usual and customary activities. The plaintiff's neurologist based his opinion on the unsworn statements of the

prior physicians and his November 19, 2009 examination, several years after the May 29, 2006 accident, and the January 22, 2007 medical examination.

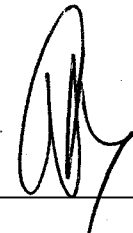
Here, the evidence submitted by the defendant in support of the motion is sufficient to establish a *prima facie* case within the meaning of Insurance Law § 5102 (d), to wit the plaintiff did not sustain a serious injury. The plaintiff's opposition consisting of unsigned, unsworn medical statements, and a recent examination and diagnosis by another physician are insufficient to raise a triable issue of fact. Moreover, the plaintiff fails to give any excuse for neglecting to comply with the strict requirement of tender in admissible form (*Jacondino v. Lovis*, 186 A.D.2d 109, *supra*). Here, the plaintiff supplied no explanation whatever as to why she failed to pursue any treatment for her injuries for years, nor did her doctors. The Court finds, as a matter of law, the defense is entitled to summary judgment and the dismissal of the complaint.

Accordingly, the motion is granted.

So ordered.

Dated: **March 16, 2010**

ENTER:



J. S. C.

FINAL DISPOSITION

NON FINAL DISPOSITION XXX

ENTERED

MAR 19 2010

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**