

Seifts v Moran

2010 NY Slip Op 31179(U)

April 23, 2010

Supreme Court, Suffolk County

Docket Number: 07-13366

Judge: Ralph T. Gazzillo

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. RALPH T. GAZZILLO
Justice of the Supreme Court

MOTION DATE 9-4-09
ADJ. DATE 2-4-10
Mot. Seq. # 001 - MG, CASEDISP

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CHARMAINE SEIFTS and ALBERT SEIFTS,	: COSTANTINO & COSTANTINO
	: Attorneys for Plaintiffs
Plaintiffs,	: 632 Merrick Road
	: Copiague, New York 11726
- against -	:
	:
JAMES G. MORAN and M.J. DIGLIO-MORAN,	:
	:
Defendants.	:
	:
-----X	

Upon the following papers numbered 1 to 19 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 10; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 11 - 17; Replying Affidavits and supporting papers 18 - 19; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendants James Moran and M.J. Diglio-Moran seeking summary judgment dismissing plaintiffs' complaint is granted.

This is an action to recover damages, personally and derivatively, for injuries allegedly sustained by plaintiff Charmaine Seifts as a result of a motor vehicle accident that occurred on May 26, 2004. Plaintiff, by her bill of particulars, alleges that she sustained various injuries as a result of the subject accident, including cervical sprain/strain; numbness in lower extremities; concussion with post concussion syndrome; left shoulder sprain; sciatica; cervicalgia; and cervicogenic headaches. Plaintiff also alleges that she was confined to her bed for approximately 1 week and that she was confined to her home for approximately 2 weeks. Plaintiff further alleges that she missed approximately 2 weeks from her employment as a part-time production manager at Giant Copy Shop.

Defendants now move for summary judgment on the basis that the injuries sustained by plaintiff do not meet the "serious injury" threshold requirement of Insurance Law § 5102(d). Defendants, in opposition to the motion, submit a copy of the pleadings, a copy of plaintiff's deposition transcript, and

the sworn medical report of Dr. Anthony Spataro. Dr. Spataro conducted an independent orthopedic examination of plaintiff at defendants' request on March 18, 2009. Plaintiffs oppose the instant motion on the ground that defendants failed to meet their prima facie burden that Charmaine Seifts did not sustain a "serious injury" as required by Insurance Law § 5102(d). Plaintiffs, in opposition to the motion, submit a copy of her verified bill of particulars, her affidavit, her unsworn medical records, and the sworn medical report of Dr. Padmaja Aradhya.

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 seeking summary judgment on the ground that a plaintiff's negligence claim is barred under the No-Fault Insurance Law bears the initial burden of establishing a prima facie case that the plaintiff did not sustain a "serious injury" (see *Toure v Avis Rent A Car Sys.*, *supra*; *Gaddy v Eyler*, 79 NY2d 955, 582 NYS2d 990 [1992]). When a defendant seeking summary judgment based on the lack of serious injury relies on the findings of the defendant's own witnesses, "those findings must be in admissible form, such as, affidavits and affirmations, and not unsworn reports" to demonstrate entitlement to judgment as a matter of law (*Pagano v Kingsbury*, 182 AD2d 268, 270, 587 NYS2d 692 [1992]). 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 *Dufel v Green*, *supra*; *Tornabene v Pawlewski*, 305 AD2d 1025, 758 NYS2d 593 [2003]; *Pagano v Kingsbury*, 182 AD2d 268, 587 NYS2d 692 [1992]). 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]).

Based upon the adduced evidence, defendants have established their entitlement to judgment as a matter of law that plaintiff Charmaine Seifts did not sustain a "serious injury" as a result of the subject accident (see *Pommells v Perez*, *supra*; *Gaddy v Eyler*, *supra*; *Knox v Lennihan*, 65 AD3d 615, 884 NYS2d 171 [2009]; *Albano v Onolfo*, 36 AD3d 728, 830 NYS2d 205 [2007]; *Giraldo v Mandanici*, 24 AD3d 419, 805 NYS2d 124 [2005]). Defendants' orthopedist, Dr. Spataro, tested the ranges of motion in plaintiff's cervical and thoracolumbar spines using a goniometer and set forth his specific measurements, as well as compared plaintiff's ranges of motion to the normal ranges (see *Cantave v*

Gelle, 60 AD3d 938, 877 NYS2d 129 [2009]; *Staff v Yshua*, 59 AD3d 614, 874 NYS2d 180 [2009]). Dr. Spataro's report states that an examination of plaintiff reveals that she has full ranges of motion in her cervical and thoracolumbar spines. The report states that an examination of plaintiff's left elbow and knees revealed that she has full ranges of motion, and that there is no swelling, tenderness, deformity, or instability in those areas. It states that plaintiff's motor functions in her extremities are 5/5, and that there is no atrophy or change in her muscle tone or muscle size. The report also states that straight leg testing in both of plaintiff's lower extremities was negative. The report concludes that plaintiff is not orthopedically disabled, that she does not require any additional treatment or physical therapy, that she is capable of performing her activities of daily living, and that her injuries have resolved without permanency.

Furthermore, plaintiff testified at an examination before trial that at the time of the accident she was traveling north, in the left lane, on Commack Road and that she first observed defendants' vehicle when it switched from the left lane into the right lane on Commack Road. Plaintiff testified that the next time she observed defendants' vehicle it was changing lanes from the right lane into the left lane, directly in front of her, without signaling. She testified that she blew her horn when she noticed that defendants' vehicle was entering her lane, but that defendant James Moran continued to enter the lane, and struck her vehicle. She testified that the right passenger side of her vehicle was struck by the trailer that was attached to defendants' vehicle. She testified that as a result of the collision her left elbow struck the driver's side door, her knees struck the dashboard, and her seatbelt tightened across her collarbone. Plaintiff testified that later in the evening she sought medical treatment, because of the pain that she was experiencing in her lower back, collarbone, head, legs, and knees. Plaintiff testified that after arriving at Good Samaritan Hospital she lost consciousness, but that she was treated and released the same day. Plaintiff testified that she missed several days from work following the accident. She testified that she next sought treatment several days after the accident from her primary care physician, Dr. Carvo, who referred her to a neurologist and an orthopedist. She testified that both the neurologist and orthopedist referred her to physical therapy, which she received for several months. She testified that she was then referred to a physical therapist that specializes in "muscle" work, and that she continues to receive this type of physical therapy intermittently. Plaintiff testified that it has been over a year since she last time received any medical treatment for the injuries she allegedly sustained in the subject accident. Plaintiff testified that her collarbone occasionally hurts her, especially if she has been doing a lot of lifting in the day. Plaintiff further testified that she can no longer participate in her Ninji II Martial Arts class, which she used to attend two to three times per week, and that she has to limit the amount of hiking and walking that she does, because she begins to experience pain in her lower back, knees, and legs.

Therefore, the burden shifted to plaintiff to come forward with competent admissible medical evidence based on objective findings, sufficient to raise a triable issue of fact that she sustained a "serious injury" (see *Gaddy v Eyler*, *supra*; *Luckey v Bauch*, 17 AD3d 411, 792 NYS2d 624 [2005]; *McLoyrd v Pennypacker*, 178 AD2d 577 NYS2d 272 [1991]). A plaintiff must demonstrate a total loss of use of a body organ, member, function or system to recover under the "permanent loss of use" category, (see *Oberly v Bangs Ambulance Inc.*, 96 NY2d 295, 727 NYS2d 378 [2001]). "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 at 798; see Toure v Avis Rent A Car Sys., supra*). Therefore, in order for a plaintiff to prove the extent or degree of physical limitation under the “permanent consequential limitation of use of a body organ or member” or the “significant limitation of use of a body function or system” category, a plaintiff must present either objective medical evidence of the extent, percentage or degree of the limitation or loss of range of motion and its duration *see Magid v Lincoln Servs. Corp.*, 60 AD3d 1008, 877 NYS2d 127 [2009]; *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]). The plaintiff must also 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 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]). A sufficient description of the “qualitative nature” of plaintiff’s limitations, with an objective basis, correlating plaintiff’s limitations to the normal function, purpose and use of the body part may also suffice (*see Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 746 NYS2d 865 [2000]; *Dufel v Green, supra*). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*see Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]). Moreover, a plaintiff alleging injury within the “limitation of use” categories who ceases treatment after the accident must provide a reasonable explanation for having done so (*Pommells v Perez*, 4 NY3d 566, 574, 797 NYS2d 380 [2005]; *see Ferebee v Sheika*, 58 AD3d 675, 873 NYS2d 93 [2009]; *Besso v DeMaggio*, 56 AD3d 596, 868 NYS2d 681 [2008]).

In opposition to defendants’ showing, plaintiffs failed to meet their burden (*see Fest v Agnew*, 68 AD3d 1051, 890 NYS2d 357 [2009]; *Colvin v Maille*, 127 AD2d 926, 511 NYS2d 982 [1987]; *lv denied* 69 NY2d 611; 517 NYS2d 1026 [1987]; *see generally Zuckerman v City of New York, supra*). Plaintiffs have not submitted any evidence to establish that the injuries Charmaine Seifts allegedly sustained resulted in a significant limitation of her lumbar or cervical regions. The term “significant” limitation must be construed as more than a minor limitation of use (*see Licari v Elliott, supra; Leschen v Kollarits*, 144 AD2d 122, 534 NYS2d 233 [1988]; *Gootz v Kelly*, 140 AD2d 874, 528 NYS2d 446 [1988]). Here, plaintiff primarily relies upon the affidavit of Dr. Aradhya, who treated her from May 27, 2004 until September 14, 2005. Dr. Aradhya opines that plaintiff suffers from cervicalgia, left sciatic neuropathy and left clavicular pain, and a permanent neurological injury in her lumbar spine, which is affecting her left lower extremities. Dr. Aradhya’s report states that plaintiff’s cervical range of motion has been reduced by 20% as compared to the normal range of motion, and that plaintiff is unable to perform her martial arts because the “numbness in her leg is causing weakness in the lower extremities, [and resulting] in an inability to carry her body weight.” Dr. Aradhya’s report opines that plaintiff has sustained a permanent injury that is preventing her from performing “some[,] if not all of her daily activities[,] which is causing her significant neurological problems. Dr. Aradhya concludes that “if plaintiff does not receive the appropriate care, she will develop a sense of arthritic changes in her lumbar and cervical spine[,] which will warrant further treatment and surgical intervention in the future.”

Dr. Aradhya’s report, however, is insufficient to defeat defendants’ motion for summary judgment (*see Stevens v Sampson*, ___ AD3d ___, 2010 NY Slip Op 3105 [2d Dept 2010]; *Colvin v*

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Maille, 127 AD2d 926, 511 NYS2d 982 [1987]; *lv denied* 69 NY2d 611; 517 NYS2d 1026 [1987]). While Dr. Aradhya's report states that plaintiff has pain and restricted ranges of motion in her cervical and lumbar spines. Dr. Aradhya's report inexplicably fails to set forth any range of motion findings or the objective tests that were performed to support her conclusion that plaintiff sustained a "serious injury" (see *Sierra v Gonzalez First Limo*, ___ AD3d ___, 895 NYS2d 863 [2010]; *Taylor v Flaherty*, 65 AD3d 1328, 887 NYS2d 144 [2009]; *Zavala v DeSantis*, 1 AD3d 354, 766 NYS2d 598 [2003]; *Black v Robinson*, 305 AD2d 438, 759 NYS2d 741 [2003]). Significantly, no proof has been offered by plaintiff to establish that her alleged ailment goes beyond temporary discomfort or is not relieved by an aspirin. The subjective complaints of pain and impaired joint function expressed by plaintiff during her deposition and in Dr. Aradhya's report are insufficient to raise a triable issue of fact (see *Sheer v Koubek*, 70 NY2d 678, 518 NYS2d 788 [1987]; *Penaloza v Chavez, supra*; *Rudas v Petschauer*, 10 AD3d 357, 781 NYS2d 120 [2004]; *Mahoney v Zerillo*, 6 AD3d 403, 774 NYS2d 378 [2004]; *Barrett v Howland*, 202 AD2d 383, 608 NYS2d 681 [1994]). Consequently, Dr. Aradhya's assertion that plaintiff has sustained a significant limitation to her cervical and lumbar regions is speculative and fails to adequately address defendants' expert's report that plaintiff has full ranges of motion in her cervical and lumbar regions (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]). The remaining submissions of plaintiff were without probative value in opposing the motion, because they were either unsworn, unaffirmed, or uncertified (see *Vidor v Davila, supra*; *Felix v New York City Tr. Auth.*, 32 AD3d 527, 819 NYS2d 835 [2006]; *Yakubov v CG Trans Corp.*, 30 AD3d 509, 817 NYS2d 353 [2006]).

Finally, the fact that plaintiff is unable to perform a few enumerated tasks for a lengthy period without pain does not constitute a curtailment from performing substantially all of her usual activities to a great extent (see *Licari v Elliott, supra*; *Crane v Richard*, 180 AD2d 706, 579 NYS2d 736 [1992]). As a result, plaintiff, who testified at her deposition that she missed "several days" from work due to her injuries, failed to raise a triable issue as to whether she 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]). Accordingly, defendants' motion for summary judgment is granted.

Dated: 4-23/10


 J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION