

Bachenheimer v McCabe
2010 NY Slip Op 31235(U)
May 11, 2010
Supreme Court, Nassau County
Docket Number: 012358/07
Judge: Randy Sue Marber
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**
JUSTICE

TRIAL/IAS PART 20

_____ X

RHONDA BACHENHEIMER,

Plaintiff,

Index No. 012358/07

Motion Sequence...03

-against-

Motion Date... 03/10/10

CASEY MCCABE,

Defendant.

_____ X

Papers Submitted:

Notice of Motion.....X

Affirmation in Opposition.....X

Reply Affirmation.....X

Sur-Reply Affirmation and Affidavit.....X

Upon the foregoing papers, the motion by the Defendant, CASEY MCCABE, seeking an Order of this Court awarding her summary judgment dismissing the Plaintiff's complaint on the grounds that the Plaintiff's injuries do not satisfy the "serious injury" threshold requirement of Insurance Law § 5102 (d) is determined as hereinafter provided.

This personal injury action arises out of an motor vehicle accident that occurred on February 23, 2007, at approximately 7:05 p.m. on Merrick Road approximately 50 feet west of Lefferts Place in Bellmore, New York. Allegedly, the Plaintiff's vehicle was in collision with the Defendant's vehicle when the Defendant's vehicle struck the Plaintiff's vehicle at or near it driver's side door.

At her oral examination before trial, the Plaintiff testified that at the time of the accident she did not complain of any injuries, told the police she was fine and did not immediately seek medical treatment. She testified that she first began to experience pain in her left knee two days after the accident when she woke up, got out of bed, put her foot on the floor and felt a sharp pain in her left knee. The first time she sought medical treatment was when she sent herself for an MRI of her left knee. She then saw an orthopedist, Dr. Kenneth Montgomery on March 6, 2007. She testified that Dr. Montgomery recommended surgery. The Plaintiff testified that at the time of her accident, she worked as a Chiropractor. The Plaintiff claims in her Bill of Particulars that as a result of this accident, she was “confined to bed for approximately five (5) days and to home for approximately five (5) days” (Exhibit C attached to the Defendant’s Notice of Motion [Bill of Particulars] ¶ 7).

The Plaintiff alleges that as a result of the subject accident, she sustained, *inter alia*, the following injuries: “left knee medial meniscal tear requiring arthroscopic surgery, scarring at surgical site, patella tendonitis of left knee, bakers cysts of left knee, limited range of motion of left knee with severe pain” (Exhibit C attached to the Defendant’s Notice of Motion [Bill of Particulars] ¶ 6). The Plaintiff’s Bill of Particular alleges that the specific categories of the serious injury statute into which her injuries fall are: “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; a medically determined injury or impairment of a non-permanent nature which prevented the plaintiff from performing substantially all of the material acts which constituted his (*sic*) usual customary

daily activities for at least 90 of the 180 days immediately following the occurrence (Exhibit C attached to the Defendant's Notice of Motion [Bill of Particulars] ¶ 17).

The Defendant submits that the Plaintiff's injuries are unrelated to the subject accident. Specifically, the Defendant alleges that the Plaintiff's injuries are not causally related to the subject accident of February 23, 2007, but were conditions caused by "other unrelated incidents" (Defendant's counsel's Affirmation dated July 27, 2009 at ¶ 16). In support of the Defendant's contention that the Plaintiff's injuries were not causally related to the subject accident, the Defendant's counsel relies on the written report of the Plaintiff's treating physician detailing the Plaintiff's initial visit to him on March 7, 2007. The report reads as follows:

"Rhonda is a forty-five-year-old female who presents with bilateral knee pain. She states that the pain in the right knee began in December when she was on a ski trip in Colorado. She states that she was walking around in ski boots and noticed severe pain in the medial aspect of her knee. She states the pain has become so severe she is unable to ambulate without difficulty and states that she has significant difficulty sleeping at night. The symptoms in the right knee have been rather recent and she has noticed them for only the past week. She states that last Monday she was jumping rope and the next day she developed severe medial knee pain in the left knee as well. Due to the fact that she has severe pain in both knees she presents for my evaluation".

Additionally, the Defendant's counsel states that no mention is made about the accident of February 23, 2007 in the operative report from the left knee arthroscopic surgery the Plaintiff had on March 14, 2007. As such, the Defendant's counsel argues, any limitations the Plaintiff may have were not caused by the subject accident.

In opposition, the Plaintiff's counsel submits that the evidence demonstrates there are triable issues of fact and as such the Defendant's motion should be denied. The

Plaintiff's attorney relies on the office records of Dr. Montgomery, specifically a note dated August 26, 2009, wherein Dr. Montgomery acknowledged that the Plaintiff did mention the motor vehicle accident at her initial evaluation.

In moving for summary judgment, the defendant must make a prima facie case showing that the plaintiff did not sustain a "serious injury" within the meaning of the statute. Once this is 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 (*see Pommels v. Perez*, 4 N.Y.3d 566 [2005]; *see also Grossman v. Wright*, 268 A.D.2d 79, 84 [2nd Dept. 2000]).

The defendant is not required to disprove any category of serious injury which has not been properly pled by the plaintiff (*Melino v. Lauster*, 82 N.Y.2d 828 [1993]). Moreover, even pled categories of serious injury may be disproved by means other than the submission of medical evidence by a defendant, including the plaintiff's own testimony and his submitted exhibits (*Michaelides v. Martone*, 186 A.D.2d 544 [2nd Dept. 1992]; *Covington v. Cinnirella*, 146 A.D.2d 565, 566 [2nd Dept. 1989]).

In support of a claim that the plaintiff has not sustained a serious injury, the defendant may rely either on the sworn statements of the defendant's examining physician or the unsworn reports of the plaintiff's examining physician (*see Pagano v. Kingsbury*, 182 A.D.2d 268 [2nd Dept 1992]). However, unlike the movant's proof, unsworn reports of the plaintiff's examining doctor or chiropractor are not sufficient to defeat a motion for summary judgment (*Grasso v. Angerami*, 79 N.Y.2d 813 [1991]).

Essentially, in order to satisfy the statutory serious injury threshold, the legislature requires objective proof of a plaintiff's injury. The Court of Appeals in *Toure v. Avis Rent A Car Systems*, 98 N.Y.2d 345 (2002), stated that the plaintiff's proof of injury must be supported by objective medical evidence, such as MRI and CT scan tests (*Toure v. Avis Rent A Car Sys.*, supra at 353). However, the MRI and CT scan tests and reports must be paired with the doctor's observations during his physical examination of the plaintiff (*see Toure v. Avis Rent A Car Systems*, supra). In addition, unsworn MRI reports are not competent evidence unless both sides rely on those reports (*see Gonzalez v. Vasquez*, 301 A.D.2d 438 [1st Dept. 2003]).

Even where there is ample objective proof of the plaintiff's injury, the Court of Appeals held in *Pommels v. Perez*, supra, that certain factors may nonetheless override a plaintiff's objective medical proof of limitations and permit dismissal of the plaintiff's complaint. Specifically, in *Pommels v. Perez*, the Court of Appeals held that additional contributing factors, such as a gap in treatment, an intervening medical problem, or a pre-existing condition, would interrupt the chain of causation between the accident and the claimed injury (*Pommels v. Perez*, supra).

“Permanent loss of use of a body organ, member, function or system”

A person bringing a claim for damages for personal injuries under the no-fault serious injury category of “permanent loss of use of a body organ, member, function or system” must prove that the permanent loss of use is a total loss of use (*Oberly v. Bangs Ambulance, Inc.*, 96 N.Y.2d 295 [2001]).

**“Permanent consequential limitation of use of a body organ or member” and
“significant limitation of use of a body function or system”**

To meet the threshold regarding the significant limitation of use of a body function or system or permanent consequential limitation category, the law requires that the limitation be more than minor, mild, or slight and that the claim be supported by medical proof based upon credible medical evidence of an objectively measured and quantified medical injury or condition (*Gaddy v. Eyler*, 79 N.Y.2d 955 [1992]; *Licari v. Elliot*, 57 N.Y.2d 230 [1982]; *Scheer v. Koubeck*, 70 N.Y.2d 678 [1987]). A minor, mild or slight limitation shall be deemed “insignificant” within the meaning of the statute (*Licari v. Elliot*, supra; see also *Grossman v. Wright*, 268 A.D.2d 79, 83 [2nd Dept. 2000]).

When a claim is raised under the “permanent consequential limitation of use of a body organ or member” or “significant limitation of use of a body function or system” categories, then, in order to prove the extent or degree of the physical limitation, an expert’s designation of a numeric percentage of the plaintiff’s loss of range of motion is acceptable (see *Toure v. Avis Rent A Car Systems, Inc.*, supra). In addition, an expert’s qualitative assessment of a plaintiff’s condition is also probative, provided that: (1) the evaluation has an objective basis, and, (2) the evaluation compares the plaintiff’s limitations to the normal function, purpose and use of the affected body organ, member, function or system” (*see id.*).

90/180 days

To prevail under the “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” category, a plaintiff must again provide competent, objective medical proof of the cause of the alleged limitations on the plaintiff’s daily activities (*Monk v. Dupuis*, 287 A.D.2d 187, 191 [3rd Dept. 2001]). Furthermore, the plaintiff must demonstrate that he has been “curtailed from performing his usual activities to a great extent rather than some slight curtailment” (*Licari v. Elliott*, *supra* at 236; *see also Sands v. Stark*, 299 A.D.2d 642 [2nd Dept. 2002]).

Unlike a claim of serious injury under the “significant limitation of use of a body function or system” category, a gap or cessation in treatment is irrelevant as to whether the plaintiff satisfied the 90/180 definition of serious injury (*Gomes v. Ford Motor Credit Co.*, 10 Misc. 3d 900, 904 [Sup. Ct. Bronx 2005]).

In support of her motion, the Defendant submits, *inter alia*, the affirmed report of Dr. John Killian, M.D., who performed an orthopedic examination of the Plaintiff on January 13, 2009. Dr. Killian’s orthopedic evaluation was conducted on January 13, 2009, approximately 23 months following the Plaintiff’s accident. His physical examination revealed that the range of motion of the Plaintiff’s knee, tested by visual observation, was found to be full and symmetrical with the right knee. Based upon the history he elicited, Dr. Killian concluded that the Plaintiff did not sustain a significant trauma to her knee in that she did not complain of any immediate pain. Additionally, Dr. Killian concluded that “it is unlikely that the tear was caused by an injury from this accident”.

The categories upon which the parties seek to define the Plaintiff’s injuries under

the Insurance Law § 5102 (d) is not in dispute. Under the “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” category, the Defendant has succeeded in making a prima facie showing that the Plaintiff did not sustain a serious injury. The Plaintiff has failed to rebut this showing and has failed to establish the existence of any material issues of fact in regard to this category.

Under the category of “permanent loss of use of a body organ, member, function or system”, the Defendant has succeeded in making a prima facie showing that the Plaintiff did not sustain a serious injury and the Plaintiff has failed to establish that her injuries caused total loss of use of her knee.

Under the category of a “permanent consequential limitation of use of a body organ or member” and “significant limitation of use of a body function or system”, although the Defendant did succeed in making a prima facie showing that the Plaintiff did not sustain a serious injury pursuant to the Insurance Law, the Plaintiff successfully countered this showing with sufficient evidence demonstrating the existence of material issues of fact that she has in fact sustained a “serious injury” pursuant to the aforementioned insurance law. A question of fact exists as to whether the Plaintiff indeed related to her treating physician, at the time of the initial evaluation, that she was involved in the subject accident and whether the alleged injury to her knee was causally related to that accident.

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist (*Barr v. County of Albany*, 50 N.Y.2d 247 [1980]; *Daliendo v. Johnson*, 147 A.D.2d 312, 317 [2nd Dept. 1987]). The motion Court does not get to weigh the credibility of the evidence, although the credibility of the evidence may be suspect.

Therefore, the Defendant's motion for summary judgment dismissing the Plaintiff's complaint is **DENIED**.

This shall constitute the decision and order of this Court.

DATED: Mineola, New York
May 11, 2010



Hon. Randy Sue Marber, J.S.C.

ENTERED
MAY 13 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE